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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. [redacted] 140

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC.,
a Corporation,
Appellant,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

JURISDICTIONAL STATEMENT

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INDEX TO BRIEF

Opinion Below 2
Jurisdiction 4
Constitutional Provisions and Statutes Involved 6
Questions Presented 9
Statement 11
The Questions Are Substantial 26

INDEX OF APPENDICES

Appendix

A Opinion of the Kansas Supreme Court Report in 192 Kan. 29 ..... A1

B Opinion of the Kansas Supreme Court Report in 192 Kan. 1 ..... A15

C Judgment of the District Court of Finney County, Kansas A57

D Judgment of the District Court of Stevens County, Kansas A61

E Report and Order of the Kansas State Corporation Commission Dated November 10, 1959 ..... A63

F October Allowable Order of the Kansas State Corporation Commission for October, 1959 ..... A70

G Petition for Judicial Review of the Report and Order A74

H Petition for Judicial Review of the October Allowable Order A82

CASES AND AUTHORITIES CITED

Bandini Petroleum Co. v. *California Superior Ct.*, (1931) 284 U.S. 8, 76 L. Ed. 136, 52 S. Ct. 103 26

Cities Service Gas Co. v. *State Corporation Commission of Kansas*, 355 U.S. 391, 2 L. Ed. 2d 355, 78 S. Ct. 381 (1958) 6, 29, 30

Cities Service Gas Co. v. *State Corporation Commission*, 180 Kan. 454, 304 P.2d 528 26

Gomillion v. *Lightfoot*, 364 U.S. 339, 5 L. Ed. 2d 110, 81 S. Ct. 125 (1960) 29

Interstate Natural Gas Co. v. *Federal Power Commission*, 331 U.S. 682, 91 L. Ed. 1742, 67 S. Ct. 1482 (1947) 30

Kansas-Nebraska Natural Gas Co. v. *State Corporation Commission*, 169 Kan. 722, 222 P.2d 704 26

Michigan-Wisconsin Pipe Line Co. v. *Oklahoma Corp. Commission*, 335 U.S. 425, 2 L. Ed. 2d 412, 78 S. Ct. 409 (1958) 29, 30

Natural Gas Pipeline Co. v. *Panoma Corp.*, 349 U.S. 44, 99 L. Ed. 866, 75 S. Ct. 576 (1955) 5, 30

Northern Natural Gas Co. v. *Republic Natural Gas Co.*, 172 Kan. 450, 241 P.2d 708 26

Northern Natural Gas Company v. *State Corporation Commission*, 372 U.S. 84, 9 L. Ed. 2d 601, 83 S. Ct. 646 (1963) 6, 29, 30

Phillips Petroleum Co. v. *Wisconsin*, 347 U.S. 672, 98 L. Ed. 1035, 74 S. Ct. 794 (1954) 5, 30

Republic Natural Gas Co. v. *State Corporation Commission*, 173 Kan. 172, 244 P.2d 1196 26

Kansas Gas Conservation Act, G.S. 1949, 55-701 ..... 7, 26

Kansas Gas Conservation Act, G.S. 1949, 55-702 ..... 7, 12

Kansas Gas Conservation Act, G.S., 1961 Supp., 55-703 8

The Natural Gas Act, 15 U.S.C. 717 ..... 6, 11, 13

United States Constitution, Amendment 14, Section 1 6

United States Constitution, Article I, Section 8 6

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JURISDICTIONAL STATEMENT

Appellant Kansas-Nebraska Natural Gas Company, Inc. (Kansas-Nebraska), appeals from a final judgment of the Supreme Court of the State of Kansas. That judgment upheld the validity of seven orders of the State Corporation Commission of the State of Kansas relating to production of natural gas from the Kansas Hugoton Field. The Commission's orders were purportedly entered pursuant to statutory authority to limit production of natural gas from a common source of supply to an amount equal to the market demand for such gas. The state's

expressed purposes in authorizing the Commission to so limit production is to prevent waste and protect the correlative rights of all persons, firms or corporations having the right to produce natural gas from a common source of supply. In fact the Commission's orders did not relate to these expressed state purposes. Instead they were designed to increase production of natural gas from the Kansas Hugoton Field over and above the amount of the actual market demand. If upheld, the orders will have the effect of regulating this Appellant's (and others' similarly situated) production and purchases of natural gas for transportation and sale in interstate commerce from all sources of supply in Kansas and in other states beyond the Commission's legitimate regulatory jurisdiction.

OPINION BELOW

With the entry on November 2, 1963, of the judgment appealed from, the Kansas Supreme Court filed its written opinion reported in 192 Kan. 29, 386 P.2d 288. The opinion is printed as Appendix "A" to this Jurisdictional Statement. The Kansas Supreme Court incorporated in that opinion by reference its opinion filed with the judgment entered in another related case decided the same day and reported in 192 Kan. 1, 386 P.2d 266. In the opinion incorporated by reference is found the Kansas Supreme Court's discussions and rulings on the federal questions involved in the judgment from which this Appellant appeals. It is therefore printed as Appendix "B" to this Jurisdictional Statement. Appellant filed a motion for rehearing of the judgment entered on November 2, 1963. The motion for rehearing was overruled by the Kansas Supreme Court on January 3, 1964, and the judgment appealed from became final on that day.

The judgment here appealed from was entered on appeals taken from judgments entered by the District Court of Finney County, Kansas, and the District Court of Stevens County, Kansas, and consolidated for hearing and consideration by the Kansas Supreme Court. Neither of the District Courts filed written opinions. The judgment of the District Court of Finney County is printed as Appendix "C" and the judgment of District Court of Stevens County is printed as Appendix "D" to this Jurisdictional Statement.

The judgments of the two Dstrict Courts were entered at the conclusion of proceedings authorized by Kansas statutes instituted for judicial review of seven orders of the State Corporation Commission. None of the orders are reported. One of the orders was a general order entered on November 10, 1959, after public hearings, purporting to determine the market demand for natural gas from the Kansas Hugoton Field for the six months period beginning October 1, 1959 and ending March 31, 1960, and for each of the six months—October, November and December of 1959 and January, February and March of 1960—within that period. This order is printed as Appendix "E" to this Jurisdictional Statement. Each of the other six orders fixed the amount of allowable production of natural gas from the Kansas Hugoton Field for one of the six months during the six months period and purportedly prorated the allowable production among all the wells in the field. One of the orders, that issued on November 20, 1959, and purporting to fix the allowable production for the month of October, 1959, is representative of all the monthly allowable orders. It is printed as Appendix "F" to this Jurisdictional Statement.

JURISDICTION

Appellant filed applications for rehearing directed to each of the seven Commission orders involved in this appeal. In each such application the conflict of state with federal authority certain to result from the orders was urged upon the Commission. Each application for rehearing was, in its turn, denied by the Commission. Appellant filed separate petitions for judicial review in the District Court of Finney County, Kansas, challenging the validity of each of the orders.

The petition for judicial review which challenges the Commission's order of November 10, 1959 (Appendix "E"), is printed as Appendix "G" to this Jurisdictional Statement. The petition for judicial review which challenges the Commission's order of November 20, 1959 (Appendix "F"), is printed as Appendix "H" to this Jurisdictional Statement. This latter petition for judicial review is representative of the other five such petitions filed.

In its petitions for judicial review Appellant challenged each of the seven Commission orders on the grounds that the pertinent statute, G.S. of Kansas, 1949, 55-703, as amended, did not authorize the Commission action taken. Further, Appellant challenged the validity of the statute if it was construed to authorize the action taken by the Commission in the seven orders complained of.

As it was in the applications for rehearing, the challenge to the validity of the statute, if so construed, was on the grounds that it permitted and authorized state action which (1) violated protections guaranteed by the Fourteenth Amendment to the Constitution of the United States, (2) constituted an unwarranted invasion by the

state commission of an area of regulation occupied exclusively by the Federal Power Commission operating under authority of the Natural Gas Act, and (3) constituted an unwarranted interference with and burden upon interstate commerce in violation of Article 1, Section 8 of the Constitution of the United States.

The invalidity of the statute and orders on these same grounds was urged upon the Kansas Supreme Court. It held that the statute authorized the action taken by the Commission. It rejected all suggestions and arguments that such action charted a course which promised a collision of state with federal jurisdiction. It held that neither the statute nor the action taken by the Commission under its authority was repugnant to the Constitution or laws of the United States and upheld the validity of both the statute and the Commission orders.

28 U.S.C. 1257 (2), 62 Stat. 929, confers jurisdiction on the Supreme Court of the United States to review the judgment of the Kansas Supreme Court, the highest Court of the State of Kansas, which embodied the rulings and decisions above recited and which became the final judgment of that Court on January 3, 1964. Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of Kansas on March 31, 1964.

The following decisions are relied on as sustaining the jurisdiction of the Supreme Court of the United States to review the final judgment of the Kansas Supreme Court here appealed:

Phillips Petroleum Co. v. *Wisconsin*, 347 U.S. 672, 98 L. Ed. 1035, 74 S. Ct. 794 (1954);

Natural Gas Pipeline Co. v. *Panoma Corp.*, 349 U.S. 44, 99 L. Ed. 866, 75 S. Ct. 576 (1955);

Cities Service Gas Co. v. *State Corporation Commission of Kansas*, 355 U.S. 391, 2 L. Ed. 2d 355, 78 S. Ct. 381 (1958);

Northern Natural Gas Company v. *State Corporation Commission*, 372 U.S. 84, 9 L. Ed. 2d 601, 83 S. Ct. 646 (1963).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article I, Section 8:

> "*Powers of Congress.* The Congress shall have power * * * To regulate commerce with foreign Nations, and among the several States and with the Indian Tribes;"

United States Constitution, Amendment 14, Section 1:

> "*Citizenship; privileges or immunities; due process clause.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Natural Gas Act, 15 U.S.C. 717:

> "717. *Necessity for regulation of natural gas companies.*
>
> (a) As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for

ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

"(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

Kansas Gas Conservation Act, G.S. 1949, 55-701:

"55-701. *Waste of natural gas prohibited.* That the production of natural gas in the state of Kansas in such manner and under such conditions and for such purposes as to constitute waste is hereby prohibited."

Kansas Gas Conservation Act, G.S. 1949, 55-702.

"55-702. *Definitions.* That the term 'waste' as herein used, in addition to its ordinary meaning, shall include economic waste, underground waste and surface waste. Economic waste as used in this act, shall mean the use of natural gas in any manner or process except for efficient light, fuel, carbon black manufacturing and repressuring, or for chemical or other processes by which such gas is efficiently converted into a solid or a liquid substance. The term 'common source of supply' wherever used in this act, shall include that portion lying within this state of any gas reservoir lying partly within and partly without this state. The term 'commission' as used herein

shall mean the state corporation commission of the state of Kansas, its successors, or such other commission or board as may hereafter be vested with jurisdiction over the subject matter of this act."

Kansas Gas Conservation Act, G.S., 1961 Supp., 55-703:

"55-703. *Production regulations; rules and formulas.* Whenever the available production of natural gas from any common source of supply is in excess of the market demands for such gas from such common source of supply, or whenever the market demands for natural gas from any common source of supply can be fulfilled only by the production of natural gas therefrom under conditions constituting waste as herein defined, or whenever the commission finds and determines that the orderly development of, and production of natural gas from, any common source of supply requires the exercise of its jurisdiction, then any person, firm or corporation having the right to produce natural gas therefrom, may produce only such portion of all the natural gas that may be currently produced without waste and to satisfy the market demands, as will permit each developed lease to ultimately produce approximately the amount of gas underlying such developed lease and currently produce proportionately with other developed leases in said common source of supply without uncompensated cognizable drainage between separately owned, developed leases or parts thereof. The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation and to prevent unreasonable discrimination in favor of any one common source of supply as against another and in favor of or against any producer in any such common source of supply. In promulgating rules, regulations and formulas, to attain such results the commission shall give equitable consideration to acreage, pressure, open flow, porosity,

permeability and thickness of pay, and such other factors, conditions and circumstances as may exist in the common source of supply under consideration at the time, as may be pertinent: PROVIDED, HOWEVER, That the daily takes of gas from any well in an unprorated gas pool shall not exceed twenty-five percent (25%) of its open flow: PROVIDED FURTHER, HOWEVER, That the provisions of this act shall not apply to any common source of supply in which the average open flow of all the producing wells therein is not in excess of seven hundred fifty thousand (750,000) cubic feet per day. The commission in determining the market demand for gas from a common source of supply shall consider the reasonable current requirements for current consumption and use within and without the state, and such other factors, conditions, or circumstances that would aid in establishing the market demand."

QUESTIONS PRESENTED

May the State of Kansas in the exercise of its authority to limit the production of natural gas under the provisions of its statutes relating to the production and conservation of natural gas, designed to prevent waste and protect the correlative rights of the owners in a common source of supply, issue orders fixing the allowable production from the Kansas Hugoton Field, a common source of supply within the meaning of its statutes, for the proration periods involved in this appeal, in amounts exceeding the total requirements of all the purchasers of gas from that field for each of the said proration periods without colliding with or wrongfully invading the exclusive jurisdiction of the federal government under the commerce clause of the Constitution of the United States, as particularly delineated in the Natural Gas Act and administered by the Federal Power Commission:

(a) When the purchasers of the gas from more than 90% of all the wells in the Kansas Hugoton Field, including this appellant, are "natural gas companies" within the meaning of the Natural Gas Act and subject to the jurisdiction of the Federal Power Commission, and

(b) When the effect of each of such orders is to allow production from the wells to which each of said "natural gas companies" is the connected purchaser in amounts exceeding their respective requirements for natural gas from the Kansas Hugoton Field, and

(c) When in order to be able to purchase and take such allowable production each of the said natural gas companies would be required to make extensive downward adjustments in their natural gas purchases from other sources of supply in the State of Kansas and in other states and related extensive adjustments in their respective interstate transmission pipelines and facilities, and

(d) When such extensive adjustments in the natural gas purchasing patterns and the interstate transmission pipelines and facilities of the natural gas companies would result in substantial additional sums being imbedded in the costs of the gas transported and sold by them in interstate commerce, and

(e) When their failure to take the allowable production from the Kansas Hugoton Field wells to which they are the connected purchasers would cause such natural gas companies to accumulate "underproduction" which is subject to cancellation under the terms of the Basic Proration Order for the Kansas Hugoton Field, and

(f) When the amount of such cancelled underproduction is spread to the other wells in the Kansas Hugoton Field and thereby effectively taken from the reserves dedicated by such natural gas companies to the markets which they have been certificated by the Federal Power Commission to serve and added to the reserves of other purchasers, and

(g) When the orders are admittedly designed to require such natural gas companies to increase the volumes of their purchases of natural gas from the Kansas Hugoton Field and to correspondingly decrease purchases from sources of supply in other states, and which if upheld could and would move other states to enter orders also designed to require increased purchases from sources of supply within such other states thereby creating insurmountable purchase pattern problems for such natural gas companies and burdening their interstate operations with unreasonable costs thereby seriously hampering the Federal Power Commission in the exercise of federal authority over such natural gas companies and their sales of natural gas in interstate commerce?

STATEMENT

Appellant Kansas-Nebraska is a Kansas corporation. It operates an integrated interstate natural gas producing, purchasing, gathering, transmission and distribution system. It is a natural gas public utility in the State of Kansas under the jurisdiction of the State Corporation Commission. It is a natural gas company within the meaning of the Natural Gas Act (15 U.S.C. 717) subject to the jurisdiction of the Federal Power Commission. It is the owner of a number of gas leases on land located in the Kansas Hugoton Field and it is a substantial producer, purchaser, gatherer, proces-

sor and transporter of natural gas in and from that field. It also produces or purchases natural gas from other sources of supply in Kansas, Oklahoma, Colorado and Nebraska. Its transmission system at the time of the instant proceedings extended from the Kansas Hugoton Field in Southwest Kansas to Northeastern Nebraska. It sold the natural gas so transported in Kansas and Nebraska both at retail through its individual city distribution systems or directly from its transmission system, and at wholesale for resale to ultimate consumers through distribution systems owned by others. It now sells such natural gas in other states as well.

The Kansas Hugoton Field is Kansas-Nebraska's principal source of supply. It relies most heavily on the natural gas available to it from that field, both from its company owned reserves and from reserves owned by others and dedicated to it under gas purchase contracts, for its continuing ability to serve both its intrastate and interstate customers.

The Hugoton Gas Field is a common source of natural gas supply which underlays a portion of the states of Kansas, Oklahoma and Texas. Production from that portion in Kansas is regulated by the State Corporation Commission of Kansas. Production from that portion in Oklahoma is regulated by the State Corporation Commission of Oklahoma. Production from that portion in Texas is regulated by the Texas Railroad Commission. Each of the three states regards that separate portion of the entire field lying within its boundaries as a separate "common source of supply." In the Kansas statutes G.S. 1949, 55-702, the definition of the term "common source of supply" was drawn specifically to apply to the Kansas portion of the Hugoton Field. That portion is most frequently referred to as the "Kansas Hugoton Field."

The five major purchasers of natural gas from the Kansas Hugoton Field are Cities Service Gas Company, Colorado Interstate Gas Company, Inc., Kansas-Nebraska Natural Gas Company, Inc., Northern Natural Gas Company and Panhandle Eastern Pipe Line Company. Collectively they take approximately 90% of all the natural gas produced from the field. All are natural gas companies within the meaning of the Natural Gas Act (15 U.S.C. 717) subject to the jurisdiction of the Federal Power Commission. All five companies regularly participate in all proceedings before the State Corporation Commission of Kansas to determine the market demand for natural gas from the Kansas Hugoton Field and the proration of allowable production among the wells in the field.

All five of these natural gas companies have various other sources of supply in Kansas and in other states. There is no other common source of supply besides the Kansas Hugoton Field from which all five produce or purchase natural gas.

In 1944, pursuant to rule making power conferred, the Commission adopted a Basic Proration Order for the Hugoton Gas Field. It provides for proceedings to determine the "market demand" for natural gas from the field in paragraph *n* as follows:

> "That there shall be two market demand hearings for each year. The first hearing shall cover the period from October 1 to March 31, both inclusive, and the second shall cover the period from April 1 to September 30, both inclusive. The allowable period established shall be a calendar month. The Commission shall issue its orders covering each allowable period and such orders shall be issued on, or near, the first day of the month for which such order is issued."

It indicates the intended relationship between "market demand" and allowable production in paragraph o as follows:

> "At such time and place as the Commission shall fix, the Commission will, after notice, conduct a hearing to determine the market demand for natural gas from said field for the next six succeeding proration periods . . . and a new schedule of production allowable for the wells in said field, based upon the determination made as a result of such hearing, shall be prepared and promulgated for the ensuing proration periods."

It provides a formula for apportioning the total allowable production from the field among all the wells in the field and states:

> ". . . The result reached by this calculation shall constitute the well's allowable, in cubic feet, which it may produce for such, proration period."
>
> * * *
>
> ". . . the production of gas in accordance with the above formula has a reasonable relation to prevention of waste, to the inequitable and unfair production of gas from the common source of supply, and to the prevention of unreasonable discrimination in favor of one producer in said field and against another producer therein and that production of gas in such manner will in fact accomplish the purposes for which article 7, chapter 55 . . . was enacted."

It recognizes that the individual wells might not always be able, during a proration period, to produce exactly the amount of allowable production assigned to them. It provides in paragraph p that the overproduction (the amount produced in excess of the assigned allowable) or the underproduction (the amount by which the well failed to produce as much as its assigned allowable) during a

proration period shall be accounted for in the next proration period as follows:

> "If, at the end of any proration period, there is an overage or underage in production for any well during such period, same shall be carried forward as a charge against or credit in favor of such well and subtracted from or added to, as the case may be, the allowable for such well for the next proration period."

In the same paragraph the Basic Order also provides limits upon the amount of overproduction or underproduction which can be accumulated and penalties for exceeding those limits as follows:

> "Any well with an overproduction of six times the amount of the current allowable assigned to it for the preceding January shall be shut in by the operator or producer and not permitted to produce any gas until such overproduction has been reduced by deductions from such overproduction made by current allowables, to the extent that the well shall not be overproduced more than five times the current allowable assigned to it for the preceding January. When any connected well has accumulated underproduction in excess of six times the current allowable assigned to it for the preceding January, such excess shall thereupon be cancelled and the amount so cancelled shall be spread among all the connected wells of the field."

A well from which the allowable production for a proration period is not taken is credited with the underproduction. Its allowable production for the next proration period is its pro rata share of the then current allowable plus the amount of the underproduction. A well from which the takes exceed the allowable production is charged with the overproduction. Its allowable production for the next proration period is its pro rata share of the current allowable minus the amount of its overproduction. Under-

production in excess of the above limits is cancelled. Overproduction in excess of the limits results in the well being shut in until the overproduction is made up.

In order for the allowable production for the entire field for any proration period to be exactly equal to the estimated market demand for that proration period, the total of all the amounts of underproduction credited to all the underproduced wells must be subtracted from that estimated market demand and the total amounts of overproduction charged to all the overproduced wells must be added to that estimated market demand in arriving at the amount of current field allowable to be prorated among all the wells. The current field allowable plus the underproduction credited to the wells and minus the overproduction charged to the wells will then equal the estimated market demand (R. Vol. II², pp. 4-27; Vol. VI², pp. 5-23).

On August 26, 1959, Commission entered its order in Docket No. 61,366-C instituting an investigation (1) "to determine the reasonable market demand for gas produced from the Hugoton Gas Field . . . for the period extending from October 1, 1959 to March 31, 1960, both inclusive" and (2) "to determine the deliverability and acreage attributable to each of the wells therein" and (3) "for the purpose of fixing gas production percentages and quotas for wells within said field". The order fixed the time and place of a hearing to be held on September 29, 1959, at Wichita, Kansas. It then recited that "at said hearing evidence will be received for all the aforesaid purposes and for determining and fixing the allowables for each of said wells within said field" for the six months proration period.

Paragraph 3 of the order reads as follows:

"That schedules have been prepared by Commission staff members as an aid to gas purchasers in the

field in submitting additional information required under the provisions of (G.S., 1959 Supp., 55-703) to enable the Commission to effectuate its duties there imposed; said schedules (listed hereinafter) are attached to this order and made a part hereof as though set out at length herein.

Schedule 1 Estimated Gas Requirements
Schedule 2 Gas Field Data
Schedule 3 Total Annual Gas Sales
Schedule 4 Total System Pipeline Capacity."

Paragraph 4 of the order reads as follows:

"That copies of the schedules above-referred to should be furnished all gas purchasers from the field and that prior to the market demand hearing on September 25, 1959, said schedules should be returned to the Director of the Conservation Division completed in conformance with the explanations attached hereto."

The four schedules and the broad range of information called for may be described as follows:

Schedule I. is entitled "Estimated Gas Requirements" and it calls for information as to "Total Estimated Purchase and Production Requirements" from each source of supply, of whatever character and wherever located, for each of the six months beginning with October, 1959 and ending with March, 1960.

Schedule II. is entitled "Gas Field Data" and it calls for the following information as to each source of supply, of whatever character and wherever located:

(1) Number of connected wells in each source of supply as of January 1, 1959.

(2) The average depth to the producing formation in each source of supply.

(3) The average wellhead pressure in each source of supply as of January 1, 1959.

(4) Recoverable reserves remaining in each source of supply as of January 1, 1957.

(5) Actual takes of gas from each source of supply during the year 1957.

(6) Percent of remaining recoverable reserves in each source of supply as of January 1, 1957, actually taken from each source of supply during the year 1957.

(7) Same information for the year 1958 as requested for the year 1957 in (4), (5) and (6) above.

(8) Same information for the year 1959 as requested for the year 1957 in (4), (5) and (6) above except that (5) and (6) necessarily called for partial estimates.

(9) Abandonment pressure used in calculating remaining recoverable reserves for each source of supply.

Schedule III. is entitled "Total Annual Gas Sales" and requires information as to all gas sold in each of the years 1954 to 1958, both inclusive, and the purchasing company's estimates of all the gas it will sell in each of the years 1959 to 1963, both inclusive.

Schedule IV. is entitled "Total System, Pipeline Capacity Available for Production of Kansas Hugoton Gas After Most Recent Additions" and requires information as to the following capacities: (1) Daily Maximum, (2) Annual Maximum, (3) Maximum Peak Day-Design, (4) Maximum Peak Month-Design, (5) Maximum Peak-Actual (1958-1599) and (6) Maximum Peak Month-Actual (1958-1959) (R. Vol. II[2], pp. 40-45; Vol. VI[2], pp. 24-31).

The Notice of Hearing directed to all producers, purchasers, royalty owners, land owners, etc., recited the purposes of the hearing and set forth notice of the time and place of the hearing all as provided for in the order of August 26, 1959, referred to above. Then without any reference to the requested schedules or any particular duties imposed upon the Commission by G.S., 1959 Supp., 55-703, the notice recites:

> "All purchasers of gas produced from said field are hereby notified to furnish by witness at the hearing hereinbefore ordered, their nominations or estimated gas requirements for the calendar months included in said proration order." (R. Vol. II[2], pp. 38-39).

The four schedules ordered furnished by the Commission and submitted by each of the five major purchasers were marked as exhibits and received in evidence at the hearing over objections made in each instance by Cities Service, Colorado Interstate, Kansas-Nebraska and Northern. The objections were on the grounds, among others, that this evidence pertained to matters beyond the state's regulatory authority and within an area of jurisdiction occupied exclusively by the federal government.

Appellant Kansas-Nebraska presented evidence through a professor of marketing at the University of Kansas as to the meaning of terms (not otherwise defined) in the pertinent Kansas statute as follows:

> ". . . the term 'market demand' means the total amount of gas which all of the purchasers from a common source of supply are willing to buy at established prices at a given time or during a given period."

> ". . . The phrase 'from such common source of supply' fixes the market place. The market demands referred to can only be those of the direct purchasers of gas from that market place."

"If a pipeline company had only one source of supply, then the volume of its sales would have a direct relationship to its demands upon that supply. In any case, where a pipeline company has more than one source of supply; there is no direct relationship between the volume of its sales and the extent of its demands on any single source of supply." (R. Vol. VI, pp. 31-35).

All of the purchasers submitted for consideration at the hearing their nominations as to their requirements for natural gas from the Kansas portion of the Hugoton Field for each of the six months from October, 1959 to March, 1960, both inclusive. The purchasers also submitted their estimated requirements for gas from the field for the succeeding six month period from April 1, 1960 to September 30, 1960, both inclusive. These nominations and estimates were tabulated in exhibit form and received in evidence as Exhibit 21. The totals by months of all the nominations submitted by all purchasers are as follows:

October, 1959	37,007,500 mcf.
November, 1959	47,048,312 mcf.
December, 1959	48,943,919 mcf.
January, 1960	50,525,412 mcf.
February, 1960	46,698,320 mfc.
March, 1960	47,578,078 mcf.

The total of all the nominations of all the purchasers for the six month's period was 277,801,541 mcf. (R. Vol. II, p. 115; Vol. VI, p. 98).

Appellant through testimony of its Chief Engineer informed the Commission of the factors taken into consideration in estimating its market demand for natural gas from the Kansas Hugoton Field which it reflected in its nominations as follows:

"(1) Kansas-Nebraska's total requirements for gas.

(2) The capacity of the various segments of its system including gathering lines, transmission lines, compressor stations and processing facilities.

(3) The estimated production allowable available from each regulated source of supply.

(4) The availability of gas from each source of supply as affected by the gathering system capacity, the rates of gas takes of other purchasers and the well capabilities.

(5) Contract obligations under the hundreds of gas purchase contracts Kansas-Nebraska has.

(6) The type of gas available, that is, whether it is oil well gas, which would be wasted if not purchased and over the producing rates of which Kansas-Nebraska has no control, or gas well gas.

(7) Short and long range plans concerning connecting new markets or serving major expansions in the present markets.

(8) Short and long range plans concerning connection of additional gas supplies.

(9) The overall operation of Kansas-Nebraska for the best interests of its customers and stockholders." (R. Vol. II[2], pp. 50-52; Vol. VI[2], pp. 36, 37).

All of the other four natural gas companies also informed the Commission as to the basis of their respective market demands which they in turn reflected in their nominations. The factors considered by each company were similar to those considered by Appellant. All of the five natural gas companies presented testimony that the nominations submitted represented the amounts of natural gas they expected to take or were ready, willing and able to

purchase from the Kansas Hugoton Field for each of the six months from October 1, 1959 to March 31, 1960.

For a period of more than three years prior to the proceedings which produced the orders complained of, the Commission had followed practices which resulted in fixing total allowable production of natural gas from the Kansas Hugoton Field for nearly all of the proration periods in excess of the market demands for such gas. The practices included determining the current market demand to be some amount in excess of the amounts of natural gas the purchasers stated they would produce or purchase and adding, rather than subtracting, the accumulated underproduction from the current market demand. As a result, by the time the instant proceedings were instituted large and steadily increasing amounts of underproduction were accumulated in the field as a whole and substantial volumes of underproduction had been cancelled pursuant to penalty provisions in paragraph *p* of the Basic Order.

In the instant proceeding, Kansas-Nebraska, Colorado Interstate, Cities Service and Northern Natural pointed out to the Commission that a determination that the market demand was in excess of the combined nominations, and the proration of allowable production to the wells in the field on the basis of such market demand determination would only serve to continue them in the position of not being able to take all of the allowable production from the Kansas Hugoton wells to which their systems were connected. All four of these natural gas companies presented evidence that in such circumstances they would continue to accumulate underproduction and risk having valuable gas reserves taken from them and assigned to other purchasers through the underage cancellation penalty provisions of the Basic Order. All further testified that the Federal Power Commission had granted them certificates

to serve their interstate markets relying on the reserves so threatened.

Kansas-Nebraska presented evidence in oral and exhibit form to describe the characteristics of its system and operations, the location of its gathering, transmission and distribution lines, the locations of all its sources of natural gas supply and the character of the gas and other factors influencing production from each. It also described the extreme variations between its winter and summer markets, the capacity of its gathering and transmission system, the changes which have occurred in all its natural gas reserves and in its Kansas Hugoton Field reserves and the relative changes in its production and purchases from all these reserves.

Also Kansas-Nebraska presented evidence at the hearing before the Commission that its gathering, processing, compressing and transmission facilities in the Kansas Hugoton Field were operated at near capacity. It made clear to the Commission that it could not materially increase its production and purchases of natural gas from the field without expending large sums for additions to these facilities. It further informed the Commission that it would not be economically feasible to make such additions and that if it took more natural gas from the Kansas Hugoton Field it would have to rearrange its production and purchase patterns to curtail its takes from other sources. Some of the other sources, it was pointed out, were fields where the natural gas was produced coincident to the production of oil. This gas is referred to as oil-well gas. It has to be taken into Kansas-Nebraska's system as it is produced or it will be flared and wasted. There is no other market for any of this gas in the Denver-Julesburg Basin area in Colorado and the Unruh area in Kansas where it is produced and it cannot be shut in (R. Vol. II[-], pp. 50-66; Vol. III[-], pp. 19-20, 22-28).

Colorado-Interstate Gas Co., Cities Service Gas Company and Northern Natural Gas Company presented evidence of the same general character relating to their respective pipe line systems and sources of supply.

With the evidence before it that this Appellant and the other natural gas companies which together take 90% of the natural gas produced in the Kansas Hugoton Field could not take such gas in volumes exceeding the amounts of their respective nominations without adding to their facilities in and from the field or without rearranging their production or purchasing patterns to curtail their production or purchases from other sources of supply and with knowledge that its previous market demand and allowable orders had caused the cancellation of substantial amounts of underproduction and had caused the accumulation of additional large volumes of underproduction which could not be taken and was therefore subject to later cancellation under the provisions of the Commission's own Basic Order, the Commission entered the orders which resulted in this appeal. These orders determined that the market demand for natural gas from the Kansas Hugoton Field for the six months period was more than 3,000,000,000 cubic feet in excess of the combined nominations of all the purchasers (Appendix "E"). The six monthly allowable orders complained of gave effect to this determination by fixing allowable production on the basis of this determination.

As has been stated in the text of this Jurisdictional Statement under the title "Jurisdiction", at all stages of the proceedings before the Commission, before the District Court of Finney County, Kansas, and before the Supreme Court of Kansas, Appellant has challenged the Commission orders and the Kansas statute G.S., 1959 Supp., 55-703 on which the Commission relies for its authority to take the action reflected in the orders, on the grounds, among

others, that the orders constitute (1) an unlawful invasion of an area of regulatory jurisdiction occupied exclusively by the Federal Power Commission under authority of the Natural Gas Act, (2) an unreasonable interference with interstate commerce in violation of Article I, Section 8 of the Constitution of the United States and (3) an unwarranted interference, under the guise of regulation, with the exercise of Appellant's private rights and privileges in areas of activity which neither the state nor the federal government have declared to be matters of legitimate public concern.

In the opinion filed with the final judgment of the Kansas Supreme Court here appealed from, reported at 192 Kan. 29, we are referred to an opinion filed with a final judgment entered the same day in a related case and reported at 192 Kan. 1 for the Kansas Supreme Court's rulings on the above federal questions. Syllabus No. 7 by the Court in the latter case which is incorporated by reference in the opinion reported at 192 Kan. 29, sets forth the rulings in the following language:

> "The record, covering numerous appeals from judgments of the district court setting aside orders of the Commission fixing production allowables for the Kansas-Hugoton Gas Field, is examined and it is held: (1) the orders were supported by substantial competent evidence; (2) the orders did not violate the provision of G.S., 1949, 55-703, or the Commission's basic order; (3) the orders did not constitute an interference with interstate commerce or invade the province of the Federal Power Commission under the Natural Gas Act; (4) the orders did not violate the due process clause of the Constitution of the United States or impair the obligation of contracts."

THE QUESTIONS ARE SUBSTANTIAL

At this point in time, the power of the State of Kansas to regulate by limiting the production of natural gas from common sources of supply within the state in order to prevent waste of a valuable resource and to protect the correlative rights of owners of interests in such production is no longer questioned. (*Bandini Petroleum Co.* v. *California Superior Ct.*, (1931) 284 U.S. 8, 76 L. Ed. 136, 52 S. Ct. 103). The Supreme Court of Kansas in a number of opinions affirmed that these are the principal purposes intended to be achieved by the Kansas statutes relating to the Production and Conservation of Natural Gas, G.S. 1949, 55-701 to 55-713, as amended. (*Kansas-Nebraska Natural Gas Co.* v. *State Corporation Commission*, 169 Kan. 722, 222 P.2d 704; *Northern Natural Gas Co.* v. *Republic Natural Gas Co.*, 172 Kan. 450, 241 P.2d 708; *Republic Natural Gas Co.* v. *State Corporation Commission*, 173 Kan. 172, 244 P.2d 1196; *Cities Service Gas Co.* v. *State Corporation Commission*, 180 Kan. 454, 304 P.2d 528). But there is no suggestion in any of these opinions, all filed in cases decided prior to the judgment appealed from, that our statutes reach beyond these purposes. Even in the opinions expressing the Kansas Supreme Court's rulings which accompanied that judgment, the Court either does not recognize or fails to acknowledge that it is dealing with an exercise of state power designed to accomplish an additional purpose wholly difterent from those to which the state law was directed and wholly beyond the state's legitimate concern.

Here the Kansas Corporation Commission under its recognized statutory authority to limit production while paying lip service to the legitimate purposes of the statutes, has taken action by issuing orders which it openly acknowl-

edges are designed to increase production by relaxing production controls.

That this was the intended purpose of the instant proceedings could be reasoned from the nature of the information the gas purchasers were required to present at the market demand hearing. It was made clear and explicit in Commissioner Byrd's candid statement to Mr. S. D. Ford, Chief Engineer for Kansas-Nebraska during Mr. Ford's testimony as follows:

> "Mr. Ford, I presume you understand the Commission had two objectives in mind. One was, maybe erroneously, to restore the actual proration of this field in the hands of the Commission instead of the pipe line companies, and second, *and probably more important*, was to increase the rate of production." (Emphasis supplied) (R. Vol. II pp. 64).

In the Commission's brief filed with the Supreme Court of Kansas, its General Counsel alludes to the "waste" of Kansas gas alleged to result from drainage of that gas across the state line into Oklahoma and frankly states on page 18 thereof that:

> ". . . relaxation of production controls is the only means of preventing this waste."

The Kansas Commission has issued its orders with full knowledge that they have the effect of requiring this Appellant and other natural gas companies under the jurisdiction of the Federal Power Commission, in order to be obedient to the orders, to reduce their takes of natural gas from other sources of supply and expend millions of dollars to add capacity to their gathering and transmission systems to take larger volumes of natural gas from the Kansas Hugoton Field. Disobedience will certainly result in cancellation of underproduction and loss of valuable re-

serves on which their continuing ability to serve the public depends. The Kansas Commission knows that in order to add system capacity these natural gas companies will have to secure approvals from the Federal Power Commission for construction of the necessary facilities. The Kansas Commission knows that if the Appellant and other natural gas companies are obedient to its orders and request approval of the necessary construction the Federal Power Commission will be faced with choosing between two decisions, neither of which would be consistent with the purposes of the Natural Gas Act which it administers. The Federal Power Commission will have to (1) grant the requested approvals knowing that the costs of the construction necessary only to enable the companies to comply with Kansas Commission orders and wholly unnecessary to continuance of service to the gas consuming public and of the extra maintenance, taxes and related items, will be reflected in the companies' cost of service recoverable only in higher rates for the natural gas they market, or (2) refuse the requested approvals knowing that the companies' resulting inability to equip themselves to take the increased allowable production will, through the operation of underage cancellation penalty provisions of the Basic Order, take away from them and transfer to others the reserves on which the Federal Power Commission has relied to assure adequate service to the public in the areas in which it has certificated these affected natural gas companies to serve.

The Kansas Commission action complained of actually creates a circumstance which, within the small range of two alternatives, both detrimental to the public, controls the decision of the Federal Power Commission. There can be no clearer example of state action which invades and

interferes with the jurisdiction of the Federal Power Commission. See *Gomillion* v. *Lightfoot*, 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960); and *Northern Natural Gas Company* v. *State Corporation Commission, supra; Cities Service Gas Co.* v. *Kansas State Corporation Commission, supra; Michigan-Wisconsin Pipe Line Co.* v. *Oklahoma Corp. Commission*, 355 U.S. 425, 2 L. Ed. 2d 412, 78 S. Ct. 409 (1958).

The Kansas Commission issued its orders with knowledge gained from all the information purchasers were required to present at the hearing concerning the character, extent and location of their various sources of supply. It knows that its orders will affect the production of natural gas from the Kansas Hugoton Field to which the orders ostensibly relate. It also knows they will affect all other sources of gas supply wherever located, in Kansas and in other states, drawn upon by the Appellant and the other natural gas companies affected, to meet the needs of the people who are their customers. The Kansas Commission intended its orders to be effective beyond the boundaries of the state. The Kansas Commission knows that even if the Appellant and the other natural gas companies affected had adequate system capacity, which they do not, to take additional volumes of gas from the Kansas Hugoton Field, it would still be necessary for them to completely rearrange their patterns of production and purchasing natural gas. Amounts of gas purchased from all other sources of supply will have to be adjusted downward as Kansas Hugoton takes are increased.

When the natural gas companies begin their attempts to lessen their takes of natural gas from sources of supply in other states to enable them to obey the Kansas Commission's orders to take more gas from the Kansas Hugoton

Field, the other states will most certainly retaliate. If all the states in which the Appellant and the other natural gas companies affected have sources of supply, take action to force increased production or purchases of natural gas from fields within their respective jurisdictions, the production and purchase pattern problems will become insurmountable. If the Kansas Commission's orders are upheld the other states will follow the Kansas example. At the same time individual landowners and producers in the other states will resort to whatever lawful means they have available to recover any loss of incomes resulting from reduced production or purchases of natural gas in which they have interests.

It is difficult to imagine a more chaotic condition for a natural gas company producing or purchasing natural gas in several states than that which Kansas-Nebraska would experience if all the states which have jurisdiction over its various sources of supply would all take action designed to force Kansas-Nebraska to take more natural gas from all those sources of supply and all the individual land owners and producers began proceedings to recover for any loss of income. It is difficult to imagine circumstances which would make it more difficult for the Federal Power Commission to exercise its regulatory jurisdiction or would constitute a more unreasonable burden upon the interstate commerce in which Kansas-Nebraska is engaged. *Phillips Petroleum Co.* v. *Wisconsin, supra; Cities Service Gas Co.* v. *State Corporation Commission, supra; Natural Gas Pipe Line Co.* v. *Panoma Corporation, supra; Northern Natural Gas Company* v. *State Corporation Commission, supra; Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U.S. 682, 91 L. Ed. 1742, 67 S. Ct. 1482 (1947); *Michigan-Wisconsin Pipe Line Co.* v. *Oklahoma Corp. Commission, supra.*

There is clearly a collision of the state action with federal authority. It could be inferred from the nature and scope of the evidence the Commission considered relevant to the issues before it at the hearing that the collision was anticipated—intended. The line separating the state's jurisdiction and that of the Federal Power Commission needs to be drawn again for the Kansas Corporation Commission. Also the threat posed by state action of the kind taken by the Kansas Corporation Commission to all natural gas companies makes it imperative that this Court take jurisdiction of this appeal and hear and consider it on the merits.

Respectfully submitted,

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*Attorney upon whom service should be made.

APPENDIX "A"

Opinion and Judgment of the Kansas Supreme Court in the Second Set of Appeals

Nos. 42,175, 42,176, 42,185, 42,230 (Consolidated)

COLORADO INTERSTATE GAS COMPANY, NORTHERN NATURAL GAS COMPANY, CITIES SERVICE GAS COMPANY, and KANSAS-NEBRASKA NATURAL GAS COMPANY, *Appellants* and *Cross-Appellees* v. THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, *Appellee* and *Cross-Appellant*, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION, and PANHANDLE EASTERN PIPE LINE COMPANY, each a corporation, *Appellees*.

No. 42,038

SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION, a corporation, *Appellee and Cross-Appellant* v. THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, *Appellee*, PANHANDLE EASTERN PIPE LINE COMPANY, a corporation, *Appellee* and *Cross-Appellant*, CITIES SERVICE GAS COMPANY, *Appellant* and *Cross-Appellee*, NORTHERN NATURAL GAS COMPANY, and KANSAS-NEBRASKA NATURAL GAS COMPANY, each a corporation, *Appellees and Cross-Appellants*.

SYLLABUS BY THE COURT

1. GAS—*Judicial Review of Commission's Orders.* The statute, G. S. 1949, 55-606, providing for judicial review of orders made by the State Corporation Commission in administering the Gas Conservation Act, contemplates but one judicial review of such orders regardless of the number of parties aggrieved.

2. COURTS—*Concurrent Jurisdiction—Court Acquiring Jurisdiction First.* The district court, which first ac-

quires jurisdiction of a petition to review an order of the Commission, has exclusive jurisdiction of the subject matter and the rights of the parties affected thereby, and a court of concurrent jurisdiction is without authority to entertain a subsequent petition for review of such order.

3. STATUTES—*Gas Conservation Act—Dual Subjects—Validity.* The 1959 amendment to the Gas Conservation Act being Chapter 237 of the Laws of 1959, now G. S. 1961 Supp., 55-703, does not contain dual subjects and the subject is sufficiently expressed in the title. It is not an unconstitutional delegation of legislative authority, and is not in violation of the due process and equal protection clauses of the federal and state constitutions.

Appeals from Finney district court, ROLAND H. TATE, judge. Opinion filed November 2, 1963. Reversed with directions. (Consolidated cases.)

Appeals from Stevens district court, L. L. MORGAN, judge. Opinion filed November 2, 1963. Affirmed. (No. 42,038.)

Malcolm Miller, of Wichita, argued the cause, and *L. M. Poe*, of Colorado Springs, Colorado, *Carl T. Smith* and *Stuart R. Carter*, both of Wichita, were with him on the briefs for appellant, Colorado Interstate Gas Company.

Mark Adams, of Wichita, argued the cause, and *Conrad C. Mount*, *John T. Grant*, *George E. Peabody* and *Charles V. Wheeler*, all of Oklahoma City, Oklahoma, *D. B. Lang*, of Scott City, *Lawrence I. Shaw*, *F. Vinson Roach* and *Patrick J. McCarthy*, all of Omaha, Nebraska, *Ray H. Calihan*, *Logan N. Green*, *Daniel R. Hopkins* and *Ray H. Calihan, Jr.*, all of Garden City, *Charles E. Jones*, *William I. Robinson*, *J. Ashford Manka*, *Clifford L. Malone*, *Mark H. Adams, II*, *John S. Seeber*, *Floyd E. Jensen* and *Joe Rols-*

ton, all of Wichita, were with him on the briefs for the appellants, Northern Natural Gas Company, a Corporation and Cities Service Gas Company, a Corporation.

Douglas Gleason, of Ottawa, argued the cause, and *James D. Conway* and *Elmer J. Jackson*, both of Hastings, Nebraska, *Thomas E. Gleason* and *Jules V. Doty*, both of Ottawa, and *Hollis B. Logan*, of Topeka, were with him on the briefs for the appellant, Kansas-Nebraska Natural Gas Company, Inc.

Richard C. Byrd, of Ottawa, argued the cause, and *J. Robert Wilson*, *John D. Townsend*, *Robert C. Londerholm*, *Charles R. Escola*, *Charles C. McCarter*, *Rex A. Jemison*, *Carl L. Wettig*, and *Glenn D. Young*, all of Topeka, were with him on the briefs for the appellee, The State Corporation. Commission of the State of Kansas.

Robert T. Cornwell, of Wichita, argued the cause, and *David W. Buxton*, *Wayne E. Coulson*, *Paul R. Kitch*, *Dale M. Stucky*, *Donald R. Newkirk*, *Gerrit H. Wormhoudt*, *Philip Kassebaum*, *John E. Rees*, *Robert J. Hill*, *Willard B. Thompson*, *Hugo T. Wedell*, and *Homer V. Gooing*, all of Wichita, *A. E. Kramer* and *Bernard E. Nordling*, both of Hugoton, were with him on the briefs for the appellee, Southwest Kansas Royalty Owners' Association.

Chas. Vance, of Liberal, argued the cause, and *C. C. Linley*, of Liberal, *Wendell J. Doggett* and *C. A. Conoley*, both of Kansas City, Missouri, and *Jeff A. Robertson*, of Topeka, were with him on the briefs for the appellee, Panhandle Eastern Pipe Line Company.

The opinion of the court was delivered by

HATCHER, C.: These appeals are from judgments rendered on petitions to review the orders of the State Corporation Commission determining the market demand for

natural gas in the Kansas-Hugoton Gas Field for the six-months period beginning October 1, 1959, and extending through March 31, 1960; and also the monthly allowable for each month of such period.

The orders were litigated in two forums. The district court of Stevens County, Kansas, entertained separate petitions to review filed by Panhandle Eastern Pipeline Company (Panhandle) and Southwest Kansas Royalty Owners' Association (Royalty Owners'). They challenged the orders, contending that the determination of market demand and allowable production was unreasonably low. The district court of Finney County, Kansas, entertained separate petitions to review filed by Northern Natural Gas Company (Northern Natural), Cities Service Gas Company (Cities Service), Colorado Interstate Gas Company (Colorado Interstate), and Kansas-Nebraska Natural Gas Company (Kansas-Nebraska). They challenge the orders contending, among other things, that the determination of market demand and allowable production was unreasonably high. (The parties will hereinafter be identified as indicated in the parentheses.)

The separate petitions for review filed in the Finney County District Court were consolidated for hearing. The separate petitions for review filed in the Stevens County District Court were also consolidated. All the appeals involve the same orders and the same record. They will be considered in a single opinion.

The questions presented by these appeals were determined in *Colorado Interstate Gas Co.* v. *State Corporation Comm.*, (41,515), 192 Kan. ....., ... P.2d ..... insofar as they challenge the Commission's orders for the reason that they are not supported by a substantial competent evidence; they violate the provisions of the Gas Conservation

Act or the Commission's basic order; they constitute an interference with interstate commerce; they invade the province of the Federal Power Commission under the Natural Gas Act, or they violate the due process clause of the United States Constitution or impair the obligation of contracts. Undue repetition will be avoided if we incorporate that opinion here by reference as determinative of the issues mentioned. We do so.

There remains for determination the jurisdictional dispute between the two district courts, and the constitutionality and effect of G.S., 1961 Supp., 55-703, which amended G.S. 1949, 55-703.

On December 15, 1959, following the overruling of petitions for rehearing, Royalty Owners' filed petitions for judicial review of the market demand order and the October allowable order in the district court of Stevens County, Kansas. On December 16, 1959, Panhandle filed similar petitions for review in the same court. Subsequent thereto, Northern Natural, Cities Service, Colorado Interstate, and Kansas-Nebraska filed petitions for judicial review, respectively, of each of said orders in the district court of Finney County, Kansas. Thereafter, all six parties filed their several petitions for judicial review of each of the other monthly allowable orders, covering the period involved, in their chosen jurisdiction.

It would serve no useful purpose to review the various motions filed by the parties in an effort to bring all parties before the court of their preferred jurisdiction, or the orders in connection therewith.

It should be noted that the district court of Stevens County, subsequent to the hearing on the merits, ruled that the Commission's order is not subject to piecemeal review from case to case and court to court.

The district court of Finney County, subsequent to the hearing on the merits, ruled that each party was entitled to maintain a separate proceeding for review and that the only parties to the proceedings were those named in the captions of the petitions for review.

The district court of Stevens County held a hearing on February 13, 1960, at which Northern Natural, Cities Service, and Colorado Interstate did not appear, although they received notice. On March 10, 1960, the court entered its judgment in which it found:

> "That the Report and Order dated November 10, 1959, and subsequent allowable orders of the State Corporation Commission are based on substantial competent evidence and are lawful and valid. Said report and order makes reasonable provisions for an orderly process correcting inequities (existing for more than ten years and which have progressively increased) discriminating in favor of the correlative rights of producers and royalty owners in the Oklahoma Hugoton Gas Field and against those in the Kansas Hugoton Gas Field; as provided by the Statutes of Kansas, Section 55-703, 1959 supplement."

The judgment of the district court of Stevens County affirmed the orders in controversy.

The district court of Finney County held a hearing on February 23, 1960. Panhandle and Royalty Owners' were not permitted to participate because they had not filed petitions for review in that court. On May 26, 1960, the court entered its judgment holding valid the market demand order for the six-months period beginning October 1, 1959, extending through March 31, 1960. It further ordered that:

> ". . . the several monthly proration orders entered by the State Corporation Commission for Octo-

ber, 1959, monthly, through March, 1960, should be, and the same are hereby, reversed and set aside insofar as the net allowables there set forth are greater by virtue of underages, either canceled or carried forward as a result of the Commission's departing from its former method of determining allowables beginning May, 1956, to October 1, 1959; and such monthly proration orders entered by the State Corporation Commission for the months of October, 1959, through March, 1960, are affirmed insofar as such orders disclose market demand and current allowables without adjustment to runs as determined by the Commission and net allowable determined by adding underage or subtracting overage from current allowable, so long as such underage or overage accrued since October 1, 1959; . . ."

It would serve no useful purpose to take time and space to align the parties as they appear before this court with their numerous appeals and cross-appeals. We will proceed to determine the jurisdictional questions presented.

Before an action may be brought by any party to a proceeding resulting in an order by the Commission, a petition for rehearing must first be filed with the Commission under the provisions of G. S. 1949, 55-606. The statute provides further:

". . . Such action may be brought by any person aggrieved, whether or not such person was the applicant for rehearing, within thirty days after the denial of the petition for rehearing, or, if rehearing is granted, then within thirty days after the final decision by the commission. . . ."

Once the petition for rehearing is concluded, any person aggrieved, whether or not such person filed a petition for rehearing, may file a petition for judicial review. One application for rehearing will suffice for all. The statute

does not anticipate that the Commission need be troubled by petitions for rehearing on the part of all the parties or persons that may be interested in an investigation or hearing, or aggrieved by the order resulting therefrom.

The statute contemplates but one action or petition for review of an order of the Commission. It does not anticipate separate actions by separate parties in different courts where a single order is involved. Once a petition for review is filed in a Court of competent jurisdiction, all interested parties may intervene and protect their rights.

The parties interested in the hearing out of which the orders in this controversy grew are numerous and varied. Many are aggrieved. The reviewing court is not concerned with individual grievances of numerous parties or with resolving disputes between parties. Its sole responsibility is to review and determine the validity of the Commission's order.

The district court of Finney County was of the opinion that each party aggrieved by an order of the Commission was entitled to maintain a separate petition to review an order of the Commission and that such separate actions could be brought in any county of proper venue. The statute does not so provide. That part of G. S. 1949, 55-606, material to this question states:

> "Any action for judicial review of any . . . order or . . . may be brought . . . in the district court of any county in the state wherein the property affected thereby is located, or, if the property affected thereby is located in different counties, then the jurisdiction shall lie in either of such counties. . . ."

If the property affected by the order is located in different counties, the jurisdiction to review the order will lie in either, not both. In *Kansas-Nebraska Natural Gas*

Co. v. *State Corporation Commission*, 176 Kan. 561, 271 P. 2d 1091, it was held in paragraph 2 of the syllabus:

> "The primary purpose and intent of creating a court of judicial review, as a part of the oil and gas conservation act, in which actions may be brought to review any rule, regulation, order or decision of the state corporation commission was: (*a*) To require interested parties to present their evidence and contentions to such commission; and (*b*) to eliminate the uncertainty and confusion which could, and probably would, result from the filing of numerous independent actions by the various parties affected by an act, or acts, of the commission, when in such independent actions the court would be deprived of the benefit of the complete record on which the action of the commission was based."

The law is well settled that where there is concurrent jurisdiction in more than one court the court which first acquires jurisdiction retains it to the exclusion of another court which is requested or seeks to assume it. (*Hoard* v. *The Home State Bank*, 176 Kan. 624, 272 P. 2d 1054; *Shields* v. *Fink, Executrix*, 190 Kan. 17, 372 P. 2d 252; *Walker* v. *McNutt*, 165 Kan. 533, 196 P. 2d 163; *Charvat* v. *Moore*, 167 Kan. 336, 205 P. 2d 980.) The court first acquiring jurisdiction may draw to itself all the issues and enjoin parties from litigating them elsewhere. (*Graves* v. *National Mutual Cas. Co.*, 164 Kan. 267, 188 P. 2d 945.)

The district court of Stevens County first acquired jurisdiction to review the market demand order for the period beginning October 1, 1959, and extending through March 31, 1960, and the October and November, 1959, allowable orders. The district court of Stevens County could have drawn all the issues to it and enjoined the parties from proceeding in another court of concurrent jurisdiction.

The district court of Finney County was without jurisdiction to review the orders.

The 1959 amendment to the Gas Conservation Act being Chapter 237 of the Laws of 1959, now G. S., 1961 Supp., 55-703, is challenged on numerous constitutional grounds. It is first contended that the act is in violation of section 16, article 2, of the Constitution of the State of Kansas, which reads: "No bill shall contain more than one subject, which shall be clearly expressed in its title. . . ."

The title to the act reads: "An act relating to the production and conservation of natural gas; amending section 55-703 of the General Statutes of 1949, and repealing said original section."

The amendment which is subject to the challenge here is found in the last proviso of the act which reads:

> ". . . *Provided further, however,* That the provisions of this act shall not apply to any common source of supply in which the average open flow of all the producing wells therein is not in excess of seven hundred fifty thousand (750,000) cubic feet per day. *The commission in determining the market demand for gas from a common source of supply shall consider the reasonable current requirements for current consumption and use within and without the state, and such other factors, conditions, or circumstances that would aid in establishing the market demand.*" (The italics identify the amendment which was added.)

The title to the act is broad enough to cover any provision relating to the production and conservation of natural gas. Insofar as the determination of market demand is material to the conservation of natural gas, it is included in a title relating to the production and conservation of natural gas.

A title is sufficient if it indicates clearly, though in general terms, the scope of the act. The more general the language of the title, the broader the subject matter of the act may be. It is not necessary that the title be an index, a synoposis, or an abstract of the entire act in all its details. The purpose of the title is to inform the legislature and the general public of the subject under consideration.

The contention that the act deals with unrelated subjects cannot be sustained. The determination of market demand is pertinent to the regulation of production and conservation of gas. In determining the market demand for gas from a common source of supply, the consideration of factors, conditions, or circumstances that would aid in establishing the market demand are germane to regulating production and conservation of gas.

Those who are interested in pursuing further the construction, purpose, and effect of section 16, article 2, of the Constitution of the State of Kansas should see *In re Sanders, Petitioner*, 53 Kan. 191, 36 Pac. 348; *Rathbone* v. *Hopper*, 57 Kan. 240, 45 Pac. 610; *State ex rel.* v. *McCombs*, 129 Kan. 834, 284 Pac. 618; *City of Lawrence* v. *Robb*, 175 Kan. 495, 265 P.2d 317; *State ex rel.* v. *Kansas Turnpike Authority*, 176 Kan. 683, 273 P.2d 198; *State ex rel.* v. *Urban Renewal Agency of Kansas City*, 179 Kan. 435, 296 P.2d 656; *State ex rel.* v. *City of Wichita*, 184 Kan. 197, 335 P. 2d 786; and *Water District No. 1* v. *Robb*, 182 Kan. 2, 318 P. 2d 387.

It is contended that the act constitutes an unlawful delegation of legislative authority.

The 1959 amendment (G. S., 1961 Supp., 55-703) did not delegate any additional authority to the Commission requiring new standards to guide it. Rather it designated

standards which were appropriate for the Commission to use in exercising the authority previously granted. (G.S. 1949, 55-703.)

If the Commission was to determine market demand six months in advance, certainly it was necessary for it to consider the market demand without the state, as very little of the gas was sold within the state. The Commission was also obligated to consider "such other factors, conditions or circumstances" as would aid it in properly determining the market demand.

The determination of market demand under the provisions of G. S., 1961 Supp., 55-703, is chiefly for the purpose of determining when the Commission shall take jurisdiction of a gas field. The Commission shall exercise jurisdiction "whenever the available production of natural gas from any common source of supply is in excess of the market demands" and other conditions exist. In *Water District No. 1* v. *Robb*, 182 Kan. 2, 318 P.2d 387, it was held:

> "While the legislature cannot delegate its constitutional power to make a law (Article 2, Section 1, Kansas Constitution), it can make a law which delegates the power to determine some fact or state of things upon which such law shall become operative." (Syl. 6.)

In *State ex rel.* v. *Fadely*, 180 Kan. 652, 308 P.2d 537, it was held:

> "The legislature may not delegate its power to make laws but may enact a law in general terms which confers upon an officer or board administrative duties to enforce and apply the law, and, to accomplish that end, to ascertain the existence or nonexistence of some future fact, event or condition which the officer or board is required to ascertain; but, the statute must prescribe reasonably clear standards by which those vested with the duty to make the statute

operate will do so in the manner intended. Where, however, the discretion to be exercised relates to a police regulation for the protection of the public morals, health, safety or general welfare, and it is impossible or impracticable to provide such standards and to do so would defeat the legislative object sought to be accomplished, legislation conferring such discretion may be valid and constitutional without such restrictions and limitations." (Syl. 7.)

In *The State* v. *Railway Co.*, 76 Kan. 467, 92 Pac. 606, affirmed *Mo. Pac. Ry. Co.* v. *Kansas*, 216 U. S. 262, 54 L. Ed. 472, 30 S. Ct. 330, the court had under consideration the constitutionality of the Article 3, Chapter 84 of the General Statutes of 1901, creating a Board of Railroad Commissioners, now the State Corporation Commission. The statute placed upon the board the responsibility of determining a "reasonable charge for services rendered" by railroads. (G. S. 1901, Sec. 5981.) The term "reasonable charge" was not defined, nor were there any standards by which reasonable charges were to be determined. The court, in considering the general constitutionality of the act, held:

"The act does not delegate to the board of railroad commissioners legislative powers. The legislature in the exercise of its power to regulate and control public corporations, such as common carriers, may delegate to a board of railroad commissioners certain functions administrative in character which cannot well be performed by the legislature itself." (Syl. 2.)

G. S., 1961 Supp., 55-703, does not contain any unlawful delegation of legislative authority.

G. S., 1961 Supp., 55-703, does not violate the due process and equal protection clauses of the federal and state constitutions.

We stated in *Colorado Interstate Gas Co.* v. *State Corporation Comm.*, (41,515), 192 Kan. ___, ___ P.2d

that the Commission was obligated to consider evidence of all factors which were pertinent to the determination of market demand under the provision of G. S. 1949, 55-703. This necessarily included all factors mentioned in the last proviso of G. S., 1961 Supp., 55-703. The Commission's abandonment of the practice of deducting past monthly underages from current allowables was also approved. The constitutional objections raised in connection with the two matters were fully considered and determined. It would serve no useful purpose to repeat here what was said in that case.

The question is presented, if the Commission was permitted or obligated under the provisions of G. S. 1949, 55-703, to consider the factors mentioned in the last proviso of G. S., 1961 Supp., 55-703, in determining market demand, why the amendment? An examination of the record and the contentions made in the briefs clarify the matter.

The Commission for many years had considered only the nominations of the pipeline companies in determining market demand. It finally became apparent to the Commission that its method of determining market demand and calculating allowables had no relation to the actual market demand in the field, and that the field was being detrimentally affected by its restrictive determinations and calculations. When the Commission attempted to make corrections by considering all material factors, its orders were set aside by a district court.

The legislature desired to make it crystal clear to both the Commission and the courts, that the Commission was to consider all pertinent factors in making its calculations and determinations.

The judgment of the district court of Finney County is reversed with instructions to dismiss the petitions for review of the orders described herein.

The judgment of the district court of Stevens County is affirmed.

APPROVED BY THE COURT.

APPENDIX "B"

Opinion and Judgment of the Kansas Supreme Court in the First Set of Appeals

No. 41,515

COLORADO INTERSTATE GAS COMPANY, *Appellee*, v. THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION, and PANHANDLE EASTERN PIPE LINE COMPANY, *Appellants, Cross-Appellants*, and *Cross-Appellees*.

No. 41,516

NORTHERN NATURAL GAS COMPANY, a corporation, *Appellee*, v. THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION, and PANHANDLE EASTERN PIPE LINE COMPANY, *Appellants, Cross-Appellants*, and *Cross-Appellees*.

No. 41,555

COLORADO INTERSTATE GAS COMPANY, *Appellee*, v. THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION, and PANHANDLE EASTERN PIPE LINE COMPANY, *Appellants, Cross-Appellants*, and *Cross-Appellees*.

No. 41,556

NORTHERN NATURAL GAS COMPANY, a corporation, *Appellee*, v. THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION, and PANHANDLE EASTERN PIPE LINE COMPANY, *Appellants, Cross-Appellants*, and *Cross-Appellees*.

SYLLABUS BY THE COURT

1. GAS—*Review of Commission's Order—Petition for Rehearing.* A district court has no jurisdiction to review an order of the State Corporation Commission issued under the provisions of the Gas Conservation Statute, G. S. 1949, 55-701 *et seq.*, in the absence of a timely petition for rehearing as required by G. S. 1949, 55-606.

2. SAME—*Extent of Court's Authority to Set Aside Commission's Order.* A district court is given authority to set aside an unlawful order of the Commission issued under the Gas Conservation Statute, but it cannot direct the Commission to follow any particular formula in correcting its order.

3. SAME—*Commission's Order Stating Formulae Factors —When Not Reviewable.* Where an order of the Commission states only formulae, factors, and policy to be followed in the future and further action is necessary before it can have any effect, it is not subject to judicial review.

4. SAME—*Setting Aside Commission's Order—Court Required to Make Findings and Conclusions.* Where a district court sets aside an order of the Commission, it is required to make findings of fact and conclusions of law which disclose the reason for its judgment.

5. SAME—*Determining Validity of Commission's Orders —What Court May Consider.* In determining the validity of the Commission's orders regulating the production of natural gas, the courts can consider only the statutes granting the Commission's authority and the Commission's basic orders with such amendments as are properly made thereto.

6. GAS—*Facts Matter of Commission's Discretion—Courts Cannot Substitute Their Judgment.* The facts that are to be considered and the relative weight to be given them in making a determination are matters

left to the Commission's discretion. The courts cannot substitute their judgment for that of the Commission.

7. SAME—*Orders of Commission Fixing Production Allowables—Validity.* The record, covering numerous appeals from judgments of the district court setting aside orders of the Commission fixing production allowables for the Kansas-Hugoton Gas Field, is examined and it is held: (1) the orders were supported by substantial competent evidence; (2) the orders did not violate the provision of G. S. 1949, 55-703, or the Commission's basic order; (3) the orders did not constitute an interference with interstate commerce or invade the province of the Federal Power Commission under the Natural Gas Act; (4) the orders did not violate the due process clause of the Constitution of the United States or impair the obligation of contracts.

Appeals from Finney district court, ROLAND H. TATE, judge. Opinion filed November 2, 1963. Reversed with directions.

Robert C. Londerholm, of Topeka, argued the cause, and *J. Robert Wilson*, *John D. Townsend*, *Charles C. McCarter*, *J. B. Grant*, and *Charles R. Escola*, all of Topeka, and *Richard C. Byrd*, of Ottawa, were with him on the briefs for the appellant, The State Corporation Commission of the State of Kansas.

Dale M. Stucky, of Wichita, argued the cause, and *A. E. Kramer* and *Bernard Nordling*, both of Hugoton, *Wayne E. Coulson*, *Paul R. Kitch*, *Donald R. Newkirk*, *Robert J. Hill*, *Gerrit H. Wormhoudt*, *Philip Kassebaum*, *John E. Rees*, *Robert T. Cornwell*, *Willard B. Thompson*, *David W. Buxton*, *Homer V. Gooing*, and *Hugo T. Wedell*, all of Wichita, were with him on the briefs for the appellant, Southwest Kansas Royalty Owners Association.

Jeff A. Robertson, of Topeka, argued the cause, and *Wendell J. Doggett* and *C. A. Conoley*, both of Kansas City, Missouri, and *Chas. Vance* and *C. C. Linley*, both of Liberal, were with him on the briefs for the appellant, Panhandle Eastern Pipe Line Company.

Malcolm Miller, of Wichita, argued the cause, and *L. M. Poe*, Colorado Springs, Colorado, *Ray H. Calihan* and *Daniel R. Hopkins*, both of Garden City, and *Carl T. Smith*, *Stuart R. Carter*, and *Gerald Sawatzky*, all of Wichita, were with him on the briefs for the appellee, Colorado Interstate Gas Company.

Mark H. Adams, II, of Wichita, argued the cause and *Lawrence I. Shaw*, *F. Vinson Roach*, and *Patrick J. McCarthy*, all of Omaha, Nebraska, *Ray H. Calihan*, *Logan N. Green*, *Daniel R. Hopkins*, and *Ray H. Calihan, Jr.*, all of Garden City, *Mark H. Adams*, *Charles E. Jones*, *William I. Robinson*, *J. Ashford Manka*, *Clifford L. Malone*, *John S. Seeber*, *Floyd E. Jensen*, and *Joe Rolston*, all of Wichita, were with him on the briefs for the appellee, Northern Natural Gas Company, a corporation.

The opinion of the court was delivered by

HATCHER, C.: These appeals are from judgments of the district court on the review of numerous orders of the State Corporation Commission establishing allowables for the Kansas-Hugoton Natural Gas Field. The review proceedings challenged the validity of monthly allowable orders and related orders pertaining to the gas field. The many appeals filed (thirty-nine) as Cases 41,515 and 41,516 are from identical judgments rendered in separate actions which were tried together on a single record and involve the orders from May, 1956, through September, 1958. Cases 41,555 and 41,556 are appeals (thirty) from similar judgments involving the Commission's six-months allow-

able order for the period from October, 1958, through March, 1959, and the monthly allowable order for October, 1958, through January, 1959.

The lower court "reversed and set aside" all of the orders in part. Appeals were then taken to this court.

Before the above mentioned cases reached this court for determination, additional appeals had been filed challenging judgments of district courts in two separate forums which had reviewed the same orders of the Commission fixing the six-months allowables for the period covering October 1, 1959, through March 31, 1960, and also the monthly allowable orders covering each month for the same period. Although these appeals will be disposed of in a separate opinion, they are mentioned here because the general facts are applicable to all.

It will be noted that the various parties filed separate appeals, separate abstracts, and separate briefs. Fifty-two separate printed documents consisting of abstracts and briefs have been presented to this court, all covering substantially the same facts and questions of law.

The district court, which disapproved the orders of the Commission, refused to make findings of fact and conclusions of law. In an attempt to have the issues pinpointed, and to develop some semblance of order from the voluminous and chaotic record, this court appointed Mr. Harry Colmery, a member of the Bar of this state, to make findings of fact and conclusions of law on what he thought to be the issues involved in the numerous appeals and report thereon. The Commissioner has done so in a most efficient and commendable manner. Although the Commissioner's findings and conclusions can be advisory only, they have served the very useful purpose of forcing the parties to limit their controversy to clear-cut issues. The findings and con-

clusions of the Commissioner are challenged in some respects. Some errors occurred because of ambiguities and confusion in the record. The report of the Commissioner has resulted in clarification of such matters through supplemental briefs.

The Hugoton Gas Field was discovered near Hugoton, Kansas, in 1922, but it was not until about 1929 that its possibilities for domestic and industrial purposes had been fully realized. It is said to be the largest known reservoir of natural gas in the world, the gas being found at a depth of about 2,600 to 2,900 feet in porous limestone and dolomite formations about 50 feet thick. The thickness of the gas producing horizons varies considerably. Such horizons are not uniform as to their porosity or permeability. The field, as presently developed, is approximately 160 miles long and varies from 40 to 72 miles in width. It covers portions of the nine counties in the southwest corner of Kansas, extends across the entire width of the Oklahoma Panhandle, and into portions of several counties of northern Texas. The largest portion, about two-thirds, of the field is located in Kansas. This portion is commonly known as "Kansas-Hugoton." The portion in Oklahoma is called "Guymon-Hugoton" and that part in Texas "Texas-Hugoton."

The sole purchasers of gas produced in the Kansas Hugoton Field, as stated by the Commission, are Cities Service Gas Company, Colorado Interstate Gas Company, Hugoton Production Company, Kansas-Colorado Utilities, Inc., Kansas-Nebraska Natural Gas Company, Inc., Northern Natural Gas Company, Panhandle Eastern Pipeline Company, Quinque Oil and Gas Producing Company, United Carbon Company, and Shallow Water Refining Company.

When the basic order for the field was promulgated in April, 1944, there were only 331 Kansas wells. When these proceedings were initiated in 1956 there were 3,555 Kansas wells producing from 2,262,748 acres. There are relatively few remaining undrilled locations.

Most of the gas from the Kansas-Hugoton Field is transported through large pipelines to points far removed from Kansas. A small portion is consumed in the Wichita, Topeka, and Kansas City areas. The rest is transported and consumed in Michigan, Minnesota, Ohio, Illinois, Indiana, Missouri Colorado, and Nebraska. With one or two exceptions the gas produced from the Oklahoma and Texas portions of the field is similarly transported through the same large pipeline systems for the same or similar uses.

The integrated pipeline systems which transport gas from the Kansas-Hugoton Field are also connected with other gas fields. Kansas gas is therein commingled with gas from various other fields, including the Guymon-Hugoton.

In 1956, five major pipelines, Cities Service Gas Company (Cities Service), Northern Natural Gas Company (Northern Natural), Panhandle Eastern Pipe Line Company (Panhandle), Kansas-Nebraska Natural Gas Company (Kansas-Nebraska), and Colorado Interstate Gas Company (Colorado Interstate), had acquired the exclusive right to purchase the gas produced from 90% of the Kansas-Hugoton wells. (These five pipeline companies, which are involved in this controversy, will hereinafter be identified as indicated in the parentheses.) Two companies, Cities Service and Northern Natural, controlled through purchase contracts approximately 56% of the field's deliverability.

Except for a very limited phase of Panhandle and Kansas-Nebraska's operations, these pipelines are not producers. They do not own the land, leases, or wells from which the gas is produced.

In 1935, the Kansas Legislature enacted a statute entitled "Production and Conservation of Natural Gas" (Laws of 1935, Ch. 213), which now appears, with some amendments, as G. S. 1949, 55-701, *et seq.*

G. S. 1949, 55-701, provides:

> "That the production of natural gas in the state of Kansas in such manner and under such conditions and for such purposes as to constitute waste, is hereby prohibited."

It will be noted that the first and main emphasis is placed on the prohibition against waste. The term waste is defined by G. S. 1949, 55-702.

G. S. 1949, 55-703, provides the conditions under which the Commission shall take jurisdiction over production in a gas field by the following language:

> "That whenever the available production of natural gas from any common source of supply is in excess of the market demands for such gas such common source of supply, or whenever the market demands for natural gas from any common source of supply can be fulfilled only by the production of natural gas therefrom under conditions constituting waste as herein defined, or whenever the commission finds and determines that the orderly development of, and production of natural gas from, any common source of supply requires the exercise of its jurisdiction. . . ."

The section further provides for ratable taking:

> ". . . The commission shall so regulate the taking of natural gas from any and all such common sources

of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation and to prevent unreasonable discrimination in favor of or against any producer in any such common source of supply. . . ."

On the 21st day of March, 1944, the Commission promulgated what it designated "Basic Proration Order for the Hugoton Gas Field." In this order the Commission first reviewed the history, development, and production in the field. It then stated that it was necessary for the Commission to take jurisdiction and to prescribe rules for the production of gas from the wells in the field and such other wells as may be later completed. The acreage for well spacing was fixed at 640. Pressure, open-flow, porosity, and thickness of pay, which determined deliverability against the pipeline pressure, was also to be taken into consideration in determining the wells' allowable. The order further provided:

"At such time and place as the Commission shall fix, the Commission will, after notice, conduct a hearing to determine the market demand for natural gas from said field for the next six succeeding proration periods, or for such other period of time as the Commission shall prescribe, and at said hearing may determine any other questions which may properly and legally come before the Commission for consideration thereat, and a new schedule of production allowable for the wells in said field, based upon the determination made as a result of such hearing, shall be prepared and promulgated for the ensuing proration periods."

Paragraph *p* of the order provided in part:

". . . If, at the end of any proration period, there is an overage or underage in production for any well during such period, same shall be carried forward as a charge against or credit in favor of such well and

subtracted from or added to, as the case may be, the allowable for such well for the next proration period. Any overage in production from any well during any proration period which is not equalized by ratable overages from all other wells in the field or which is not compensated for in the allowables fixed for other wells in the field for the next succeeding proration period or not otherwise made up within one year after the proration period in which it occurred, shall constitute illegal overproduction from such well and such well shall be shut in until such overage is thereby fully made up. All wells with an overproduction of three times the amount of their current month's allowable shall be shut in by the operator or producer and not permitted to produce any gas until such overproduction has been fully absorbed by deductions from such overproduction made by current allowables. When any connected well has accumulated an underage in excess of three times its allowable for the current month, such excess shall thereupon be canceled and the amount so canceled shall be spread among all the wells of the field. Any underage so canceled shall not be considered in the determining of the future production of any such well, unless, upon notice and hearing, the Commission shall otherwise determine: *Provided, however*, That in no event shall any underproduction of an unconnected well be canceled."

The order further provided:

"That this order should constitute the Basic Order for the proration of production in said field on or after March 31, 1944, and until amended, changed, or modified by further order of the Commission.

"It Is Further Ordered: That the Commission hereby retains continuing jurisdiction of the subject matter hereof and of the parties hereto for the purpose of issuing from time to time such further order, amendments, additional orders, rules and regulations as may be necessary and proper in the premises."

Under the basic order each well was allowed to produce a certain quantity of natural gas per month. This was called the well's "allowable." From the beginning of proration in the Kansas-Hugoton Field until May, 1956, the allowables were set twice a year (March and September). The Commission held market demand hearings where the pipelines presented their estimated takes (nominations) for the following six-month period. Each month the total nominations were taken to be the market demand for the field for that month. The market demand figure was adjusted by subtracting the field underage (allowable in excess of runs) for the prior month or by adding the field overage (runs in excess of allowables) for the prior month, whichever had happened. This adjusted figure (called current allowable) was spread ratably to the wells in the field.

The "net allowable" is not the figure that is spread to the wells. Only the current allowable is spread ratably among the wells in the field. Net allowable reflects the cumulative status of a well or wells. Some wells would be in an overproduced status and some would be in an underproduced status at the end of the prior month's runs. If a well were 500 MCF underproduced and its share of the field current allowable was 500 MCF, then its "net allowable" at the beginning of the month would be 1,000 MCF. The field net allowable reflected the cumulative status of the field at the beginning of the period for which the allowables were determined.

This method of calculating the allowables not only tended to hold the allowables to the requirements of the pipeline companies taking the least amount of gas from the field in proportion to which its connected reserves bore to the field as a whole, but prevented increased takes of

gas by one company when it acquired new consumer markets unless the other pipelines also wanted to take more gas. If one pipeline company nominated to receive more gas, the extra allowable would be spread among all the wells in the field. If the other pipeline companies continued taking at the old rate, an underage would be created. The following month this underage would be deducted from the market demand to find the current allowable so they would be back where they started. Obviously one pipeline company could not effect any material change in the allowables unless the other pipeline companies went along with it. The pipeline companies did not expand at the same time, when one wanted more gas, the rest could exercise veto power.

It finally became apparent to the Commission that its method of fixing allowables was preventing the individual pipeline companies from obtaining their market demands, that the allowables which it was fixing had no relation to the actual market demand in the field, and that the field was being detrimentally affected by the allowables.

When the Commission issued its order for the regular market demand hearing on March 30, 1956, to determine the allowables for the period April 1, 1956, through September 30, 1956, it also issued an order to show cause, directed to the pipeline companies, for the purpose of obtaining information with which to solve the problem which its method of fixing allowables had created.

Under such order the various purchasers to whom it was directed were required to produce certain information set forth therein not less than five days prior to March 30, 1956. On March 30, 1956, the show cause docket was consolidated with the market demand hearing for the six months' period from April 1, 1956, to September 30, 1956.

Thereafter such matters were heard on a common record, although various docket numbers were assigned to such hearings for the separate six months' market demand hearings.

The April, 1956, monthly allowable order used the "old method" but was entitled "Interim Order" as were the monthly orders to and including November, 1957. After April, 1956, the Commission started experimenting with its method of determining allowables. It merely increased the market demand figure for three months (May, June, and July, 1956). A questionable procedure as it was without factual support. Next the Commission returned to the "old method" of letting nominations control the market demand figure, but stopped adjusting the market demand figure, in arriving at the allowable, by deducting underages or adding overages for the prior month. The current allowable was the nomination plus any canceled underage, for the preceding month, to be respread to the field pursuant to the basic order. This current allowable was spread to all wells in the field. This procedure was followed from August, 1956, through February, 1958, with the exception that in February and March, 1957, the Commission disregarded a zero nomination filed by Colorado Interstate and used instead its runs for a prior comparable period.

After its Report and Order, effective February 1, 1958, closing the show-cause docket, the Commission started determining the market demand by considering nominations, the rate of increase in total consumer markets of the pipeline companies compared to the rate of increase in their takes from the Kansas-Hugoton, the takes from other sources of supply, and other factors. The Commission continued the practice of not adjusting the market demand figure in arriving at the allowable by deducting the under-

ages or adding the overages for the prior month. This procedure was followed from March, 1958, through January, 1959, and has continued.

Colorado Interstate and Northern Natural filed separate petitions for review of the orders under consideration in the district court of Finney County. Panhandle and the Southwestern Kansas Royalty Owners Association (hereinafter referred to as Royalty Owners) intervened.

The cases were not consolidated but were tried on a common record. The lower court "reversed and set aside" all of the orders and further directed, as to the monthly allowable orders, that:

> ". . . the allowables set forth therein are void insofar as they are in excess of the allowables which would have been established under the method of calculating allowables used by the State Corporation Commission prior to May of 1956."

Following the overruling of motions for new trials, the Commission, Panhandle, and the Royalty Owners, appellants, filed separate appeals, abstracts, and briefs. Northern Natural and Colorado Interstate, appellees, filed separate counter-abstracts and briefs. The contentions of each of the three appellants are similar in nature and will not be separately considered. The same is true of the contention of the appellees.

Certain procedural questions have been raised which will first be given attention. Although the decision on the merits may render their determinations unnecessary, it is advisable that the proper procedure be outlined in order that the courts shall not again be faced with the chaotic situation that exists here.

The appellants contend that the allowable orders issued prior to November, 1957, are not subject to judicial

review because no timely application for rehearing was filed with the Commission. We agree with appellants' contention.

Proceedings for judicial review of orders of the Commission are authorized by G. S. 1949, 55-707. It provides that such actions ". . . may be brought and proceedings respecting same shall be governed by and appeals may be taken as provided in section 55-606 of the General Statutes of Kansas of 1935, as amended [now G. S. 1949, 55-606], and that each and all of the provisions of said section, as so amended, shall apply to and govern such actions arising under this act."

With respect to actions for judicial review of the orders of the Commission, G. S. 1949, 55-606, provides:

> ". . . Before any such action may be brought by a person who was a party to the proceeding resulting in the making of a . . . order . . . of the commission, *a petition for rehearing shall first be filed with the commission within ten days from the date of the making of the . . . order . . . in question.* A rehearing shall be granted or denied by the commission within ten days from the date said petition is filed and if rehearing be not granted within ten days it shall be taken as denied. If rehearing be granted the matter shall be set for hearing as promptly as shall be convenient, and shall be determined by the commission within thirty days after the same shall be submitted. Such action may be brought by any person aggrieved, whether or not such person was the applicant for rehearing, within thirty days after the denial of the petition for rehearing, or, if rehearing is granted, then within thirty days after the final decision by the commission. . . ." (Emphasis ours.)

No petition for rehearing of any of the orders entered prior to November, 1957, were filed within the time prescribed by G. S. 1949, 55-606. The statute makes the filing

of a timely petition for rehearing a prerequisite to the filing of a petition for judicial review.

The court had no authority to review the orders of the Commission except in the manner and to the extent the statute gave it such authority. (*City of McPherson* v. *State Corporation Commission*, 174 Kan. 407, 414, 257 P.2d 123.)

In *Continental Investment Corp.* v. *State Corporation Comm.*, 156 Kan. 858, 137 P.2d 166, it is stated:

> ". . . When a person has a grievance against an order or ruling of an official board, he must seek redress in conformity with the procedure prescribed by the pertinent statute. In this case, that procedure is laid down in G. S. 1941, Supp., 55-605, 55-606. . . ." (p. 868.)

In *United States* v. *Tucker Truck Lines*, 344 U. S. 33, 36, 37, 97 L. Ed. 54, 73 S. Ct. 67, the court stated the rule as follows:

> "We have recognized in more than a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. . . ." (See also *F. P. C.* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 99 L. Ed. 583, 75 S. Ct. 467.)

The appellees do not contend that they filed timely petitions for rehearing at the time the monthly allowable orders were issued. They contend that these orders were interim, and not appealable until finalized by the Commission's general order effective February 1, 1958.

The orders were designated "Interim Orders." The district court ruled that this designation indicated that the orders were not final.

We are concerned with the nature, character, and effect of the order and not with its name. (*Hayward* v. *State Corporation Comm.*, 151 Kan. 1008, 1013, 101 P.2d 1041.) G. S. 1949, 55-606, does not require that an order must be a "final" in order to be subject to review. It authorizes the review of "any" order by any person aggrieved by such order. It is not concerned with appeals, or appealable orders, nor with the definition of a final order in appellate procedure, or the jurisdiction of the courts with respect to such under the Code of Civil Procedure.

Whether or not a particular determination made by an administrative body is an "order" subject to review is determined by the substance of what that agency purports to do, or has done by the order, and not by the label placed upon it. Under the review procedure, an order is reviewable which determines rights or obligations or fixes some legal relationship as a consummation of the administrative process. (*C. & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103, 92 L. Ed. 568, 577, 68 S. Ct. 431.)

The Supreme Court of the United States, in *Pennsylvania R. Co.* v. *United States*, 363 U. S. 202, 4 L. Ed. 1165, 80 S. Ct. 1131, stated the applicable principle as follows:

> ". . . We decided some years ago that while a mere 'abstract declaration' on some issue by the Commission may not be judicially reviewable, an order that determines a 'right or obligation' so that 'legal consequences' will flow from it is reviewable. . . ." (p. 205.)

Each of the monthly allowable orders contained the following statement:

> "That an interim order should be entered herein determining a schedule of production allowable to wells in the Hugoton Gas Field for the month of [particular month specified] 1957, but determinative of

no other issue in Docket 51,488-C (c-4916) now pending before the Commission."

It is quite definite that the Commission intended the monthly allowable order to be final but not to determine or close the investigation under the show-cause docket. As timely petitions for rehearing were not filed covering the monthly allowable orders for May, 1956, through October, 1957, the orders were not subject to judicial review.

The district court reviewed the report and order of the Commission effective February 1, 1958, in which the Commission closed the show-cause docket, found the order void, and adjudged that it be set aside. The appellants contend that the order was not a proper subject for judicial review because it did not affect the rights of the parties but merely outlined the prospective action of the Commission. Appellants' contention is correct. The report and order does not of itself adversely affect anyone. An adverse effect will follow only if some future action is taken by the Commission.

The report and order reviewed the proceedings which took place under the show-cause order issued March 16, 1956; stated the questions presented for determination; set out findings of fact and the evidence to support them; stated the market demand factors to be considered in the future; presented the method for calculation of allowables, and considered the balancing period for over and under production of wells.

Some additional action in the way of fixing definite allowables had to be taken before the order could have any actual effect. If the adverse effect will follow only if some future action is taken by the Commission, the order is not subject to judicial review. This issue was determined in *Hayward* v. *State Corporation Comm.*, 151 Kan.

1008, 101 P.2d 1041, where this court had under consideration the first basic order issued by the Commission in connection with the Kansas-Hugoton Gas Field. The court stated the Commission's contention as follows:

> "Appellant [Commission] contends the basis order was not self-executing, but was merely a standard, formula or guide pursuant to which the schedule of well allowables was to be determined and thereafter promulgated; that the commission had not completed its work, in that it had not yet determined and hence had not issued its schedule of well allowables. . . ." (p. 1014.)

The court held that the duties of the Commission were prematurely and improvidently stayed, stating:

> ". . . The fundamental principle that courts have no right to interfere by injunction with administrative and legislative functions yet to be performed by the corporation commission, is well established. (*State, ex rel.*, v. *Flannelly*, 96 Kan. 372, 386-387, 152 Pac. 22; *Kansas City* v. *Utilities Commission*, supra; *State, ex rel.*, v. *Capital Gas & Elec. Co.*, 139 Kan. 870, 888, 33 P. 2d 731; *State Comm'n* v. *Wichita Gas Co.*, 290 U. S. 561, 78 L. Ed. 500, 504-505.) Cases involving completed administrative and legislative functions are not in point. . . ." (l.c. 1015.)

The decision appears to be in harmony with the decisions of the Supreme Court of the United States.

In *Rochester Tel. Corp.* v. *U. S.*, 307 U. S. 125, 83 L. Ed. 1147, 59 S. Ct. 754, the court said:

> ". . . the order sought to be reviewed does not of itself adversely affect complainant, but only affects his rights adversely on the contingency of future administrative action. In view of traditional conceptions of federal judicial power, resort to the courts on these situations is either premature or wholly be-

yond their province." (p. 130.) (See also, *C. & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103, 92 L. Ed. 568, 68 S. Ct. 431 and *United States* v. *Los Angeles R. R.*, 273 U. S. 299, 71 L. Ed. 651, 47 S. Ct. 413.)

In the appeals Nos. 41,515 and 41,516, the monthly allowable orders for the months beginning May, 1956, and extending through November, 1957, and in appeals Nos. 41,555 and 41,556, the monthly allowable orders for the months October, November, and December, 1958, and January, 1959, were found by the district court to be void, and reversed and set them aside, stating:

> ". . . that the allowables set forth therein are void insofar as they are in excess of the allowables which would have been established under the method of calculating allowables used by the Commission prior to May of 1956." (Although the wording is not exactly the same in all the judgments, the result is the same in each.)

The administration of the law with respect to the production and conservation of natural gas is classified in that recognized area of regulation which necessitates the authority to exercise a considerable degree of discretion. The legislature delegated that authority to the Commission and with great latitude for the exercise of discretion through the promulgation of rules, regulations, orders, and decisions. In recognition of that authority, in providing for judicial review of the Commission's actions, it specifically limited the authority of the reviewing court by providing that:

> ". . . The authority of the court shall be limited to a judgment either affirming or setting aside in whole or in part the rule, regulation, order or decision of the commission. . . ." (G. S. 1949, 55-606.)

The record before us shows that prior to May, 1956, the Commission followed a pattern or formula in the setting of allowables and that after May, 1956, it adopted a different formula. The nature of the difference is not material at this point. It is sufficient to state, and it is agreed, that a change was made and that it produced different results.

The appellants contend that the district court, by its order, reduced the allowables to a determinable figure, made its own determination of what the allowables should be, and determined what formula should be used. We are forced to agree.

G. S. 1949, 55-606 gives the reviewing court authority to set aside any unlawful or arbitrary or unreasonable order, in whole or in part. But it does not give the court authority to substitute its judgment for that of the Commission by directing the Commission to enter a certain type of an allowable order or by prescribing the formula which it must follow. The court has the authority to set aside only a part of the order. If, in this case, the court had set aside the entire allowable but let the remainder of the order stand, it would have been well within its jurisdiction. When the court determined the amount of the allowable by setting aside, not a part of the order but a part of the allowable, it is a clear invasion of the administrative function. This court considered the question in *White Eagle Oil Co. v. State Corporation Comm.*, 168 Kan. 548, 214 P. 2d 337, where the district court set aside the orders of the Commission for the reason they denied the assignment of an allowable to a well on the basis of 640 acres as attributable thereto. The court said:

> "... That portion of it [the order] which directed the commission after consideration to enter its order assigning to the gas well an allowable based on the

attribution thereto of the north half of section ten and the south half of section 6 was incorrect. The order should have been simply that the action was remanded to the commission with directions that it further consider its order." (p. 557.)

In *City of McPherson* v. *State Corporation Commission*, 174 Kan. 407, 257 P. 2d 123, in considering the authority of the reviewing court under a similar statute, this court said:

". . . Its function was to consider what the Commission had considered, not to inject its own views into what should have been considered by the Commission. The court had no authority under the statute to review the work of the Commission except in the manner and to the extent the statute gave it such authority. . . ." (p. 414.)

The power of a court to replace the Commission's orders with its own, with respect to the establishment of allowables, has been ruled on specifically by courts in other oil and gas producing states having proration. In *Marrs* v. *R. R. Commission*, 142 Tex. 293, 177 S. W. 2d 941, the district court reversed the monthly allowable orders and also held that the Commission could not set the allowables below 35,000 barrels daily. The Texas Supreme Court agreed that the allowable orders should be reversed, but as to the lower court's attempt to prescribe the terms of the Commission's allowable orders, it said:

". . . A court has the right to review the action of the Railroad Commission, and to strike its orders down if they are illegal; but it has no authority to write a proration order for the Commission, nor to prescribe the terms of a subsequent order to be entered by the Commission. . . .

"The responsibility rests with the Commission to devise some scheme of proration that will conserve

> the oil in the field in question, and at the same time will be fair and just and will not deprive petitioners of their property. There are many and varied methods that may be adopted by the Commission to accomplish this purpose. This necessarily involves the exercise of the discretion that has been committed by the Legislature to the Commission, and it would amount to a usurpation of the Commission's power by the court, for the court to undertake to prescribe the terms of such an order." (pp. 306, 307.) (See also *Brown et al. v. Humble Oil Co.*, 126 Tex. 296, 83 S. W. 2d 935, and *Interstate Comm. Comm. v. Ill. Cent. R. R.*, 215 U. S. 452, 54 L. Ed. 280, 30 S. Ct. 155.)

In connection with numerous cases pending before the court for judicial review the appellant, Panhandle, filed motions requesting the court to make findings of fact and conclusions of law. The district court overruled the motions and entered its judgments setting aside the orders of the Commission. Panhandle claims error.

G. S. 1949, 55-606, which is made applicable to the review of the Commission's orders regulating the production of gas by G. S. 1949, 55-707, makes no specific provision for findings of fact and conclusions of law by the reviewing court. The statute provides its own procedure for judicial review and the provisions of the Code of Civil Procedure are not applicable where the procedure is covered by the statute. However, the statute further provides, ". . . All actions brought under this section shall have precedence in any court and on motion shall be advanced over any civil case of different nature pending in such court, and *such action shall be tried and determined as other civil action.* . . ." (Emphasis ours.) The purpose of this provision appears to be clear. Such procedural matters as are not covered by the oil and gas review statute are to be governed by the Rules of Civil Procedure as "such actions shall be tried and determined as other

civil actions." Any other interpretation placed upon the provision would leave it without any force or effect.

G. S. 1949, 60-2921, provides:

> "Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its finding, except generally, for the plaintiff or defendant, unless one of the parties request it, in which case the court shall state in writing, the conclusions of fact found, separately from the conclusions of law."

This court considered the review statute in *Wakefield v. State Corporation Comm.*, 151 Kan. 1003, 101 P. 2d 880, and stated at page 1007:

> ". . . The twelfth sentence, in providing that the district court shall not be bound by any finding of fact made by the commission, clearly indicates it was intended the district court should review the record before the commission in order to make its own independent findings of fact. . . ."

It was the failure of the trial court to make findings of fact and conclusions of law that has resulted in the voluminous record now before us. The result of the failure is well stated in Panhandle's brief as follows:

> "The cross petition of Panhandle Eastern in the Finney County Court attacked the Commission's market demand determination and raised an issue of fact. We doubt very much if the court ever considered the evidence regarding market demand. As long as the trial court adhered to the view that the runs must control the allowables, any question about market demand would be academic and such review would serve no practical purpose. It is necessary, however, to preserve the issue because it is of paramount importance if the runs do not control. The attorneys for this appellant vainly endeavored to find out the basis of the decision. Because of this failure, it has been

necessary to abstract in detail a most voluminous record together with all various orders, pleadings and other papers, most of which may prove to be immaterial, but which could not safely be omitted. This is exactly the situation the statute is intended to prevent. . . ."

We must conclude that if the reviewing court does not adopt the findings of fact and conclusions of law of the Commission, it must make its own findings of fact and conclusions of law upon the request of any interested party.

Other important procedural questions pertaining to piecemeal review by various parties in multiple actions in separate district courts have been raised. They have not been ignored. However, the factual issues by which they are raised are not without dispute. The same questions are raised in the appeals in similar cases which were filed later and in which the facts are not in dispute. The remaining procedural question will be discussed in the opinion disposing of the appeals in the later cases. (*Colorado Interstate Gas Co.* v. *State Corporation Comm.*, 192 Kan. ....., ... P. 2d .....)

We may now proceed to discuss the basic issues presented.

Certain monthly allowable orders (November, 1957, through January, 1958), issued by the Commission before its report and order, effective February 1, 1958, was entered, were before the district court for review, and are before this court on appeal. However, as the Commission followed the same formula in determining these monthly allowables as it did in determining the monthly allowables after it entered its report and order, it would serve no useful purpose to extend further this lengthy opinion by a separate discussion of them. We will consider the

market demand determinations and the allowables made for the months beginning March, 1958, and extending through January, 1959.

The Commission's method of determining market demand and establishing allowables for the Kansas-Hugoton Field present the basic issues.

It may be stated as a general proposition of law that the determination of market demand and establishing allowables is a responsibility which the legislature has lodged in the Commission. The courts are without jurisdiction to determine the method the Commission should use or the factors which it should consider. The courts may examine the methods used for the purpose of determining whether the Commission has acted within the power and authority delegated to it by the legislature.

In considering the validity of the Commission's determination, the courts can consider only the statutes granting the Commission's authority and the Commission's basic order with such amendments as are properly made thereto. The determination is a question of fact. What facts are to be considered and the relative weight to be accorded them are matters left to the Commission's discretion. Unless the determination is arbitrarily or capriciously made without supporting evidence, the courts cannot interfere and substitute their judgment for that of the Commission. The question for the reviewing court is the power of the Commission to make the order, not its wisdom, propriety or expediency in having made it. (*Interstate Comm. Comm.* v. *Ill Cent. R. R.*, 215 U. S. 452, 54 L. Ed. 280, 30 S. Ct. 155.) In *City of McPherson* v. *State Corporation Commission*, 174 Kan. 407, 257 P. 2d 123, in considering the authority of the reviewing court under a similar statute, this court said:

". . . Its function was to consider what the Commission had considered, not to inject its own views into what should have been considered by the Commission. The court had no authority under the statute to review the work of the Commission except in the manner and to the extent the statute gave it such authority. . . ." (p. 414.)

It will perhaps be less confusing if we first consider the Commission's authority, the manner in which it determined market demand, and the evidence which it considered.

It should be noted that G. S. 1949, 55-703, is the only section in the statute pertaining to production and conservation of gas which makes direct use of the phrase "market demand." The determination of market demand is not the end result sought by the statute. It is rather the determination of the conditions under which the Commission shall take jurisdiction of production in a gas field.

The Commission shall regulate the taking of natural gas, ". . . [1] whenever the available production of natural gas from any common source of supply is in excess of the market demands for such gas from such common source of supply; or [2] whenever the market demands for natural gas from any common source of supply can be fulfilled only by the production of natural gas therefrom under conditions constituting waste as herein defined, or [3] whenever the commission finds and determines that the orderly development of, and production of natural gas from, any common source of supply requires the exercise of its jurisdiction, . . ." (G. S. 1949, 55-703.)

The Commission's basic order made use of the phrase "market demand" only in the following particular:

". . . At such time and place as the Commission shall fix, the Commission will, after notice, conduct

> a hearing to determine the market demand for natural gas from said field for the next six succeeding proration periods, or for such other period of time as the Commission shall prescribe, . . ."

Neither the statute nor the basic order defined "market demand." The term has rather a common understood meaning. Market demand is that amount of a commodity which the consuming public is able and willing to buy.

The word "demand" as used in a commercial sense is defined by Webster's New Century Dictionary (Unabridged) Second Edition:

> ". . . in economics, (a) the desire for a commodity together with ability to pay for it; (b) the amount people are ready and able to buy at a certain price. Opposed to *supply*. . . ."

The price and the availability of gas in the Kansas-Hugoton Field is not a deterring market factor. However, the consuming public cannot buy unless the gas is transported from the field to the market. Therefore the market demand for gas in the Kansas-Hugoton Fie must be that amount which the consuming public is able and willing to purchase, restricted to the amount which the pipeline companies in the field are able to transport to the market.

Neither the statute nor the basic order state the formula or factors which the Commission shall use in determining market demand, nor the evidence which shall be considered. These matters are left to the discretion of the Commission.

The factors which the Commission used in determining market demand, in addition to those used prior to 1956, will next be considered.

Following the issuance of the show-cause order in March of 1956, the Commission held extensive hearings

covering the situation in the Kansas-Hugoton Field in general and the market-demand in particular. It issued its report and order, covering the matter, effective February 1, 1958. The Commission, among other findings, found and concluded in connection with the determination of market demand:

> "A review of the Commission's past allowable orders and the evidence presented in these dockets discloses that heretofore the nominations by the purchasers from the Hugoton Field have been used and considered by the Commission as the market demand for the field. However, the evidence presented in these dockets discloses that in many instances the aforesaid nominations did not approximate the market demand. Therefore, the Commission finds that it is necessary, in determining the market demand for natural gas from the Hugoton Field, to consider, in addition to the nominations by the purchasers, the following factors:
>
> "(1) Takes from other sources of supply to which the purchasers are connected.
>
> "(2) The total markets for natural gas of all purchasers from the Kansas-Hugoton Field; the rate of increase therein compared to the rate of increase in the takes from the Kansas portion of the Hugoton Field.
>
> "(3) Takes from other sources of supply in Kansas.
>
> "(4) Any other factors, conditions and or circumstances that would aid the Commission in establishing the market demand."

There is ample evidence to support the Commission's conclusion that in many instances the nominations did not approximate the market demand in the field. We will not review the evidence here as it will be discussed in

considering allowables. The question presented at this point is whether the Commission erroneously considered the factors quoted above in addition to the nominations by the pipeline companies.

The appellees contend that the pipeline companies' nominations are the only evidence of market demand that should be considered. We do not agree. The Commission endeavors to determine market demand for six months in the future. It must of necessity give some consideration to the entire market demand, the capacity of the pipelines in the field; possible addition of new consumers, increase in consumer demand, prospective weather conditions, and all factors that may affect the consumer, if its determination is to have veracity.

The Commission gave consideration to the new factors mentioned in its report and order, "in addition to the nomination of the purchasers." The record does not disclose what weight the Commission gave the new factors. It is not necessary that the Commission state just what weight it gives each factor covered by the evidence. If the evidence is admissible, it is for the Commission to determine the weight it shall be given, not the courts.

It would appear that the Commission used the additional factors mentioned largely for the purpose of checking the accuracy of the nominations. We have checked the nominations against the Commission's finding of market demand for the first nine months of 1958, and find no startling difference. During the winter months, January, February, and March, while the demand was well in excess of 40,000,000 MCF, the nominations and the market demand found by the Commission were substantially the same. During the months of April through September, the monthly market demand found by the Commission exceeded the nominations by approximately

2,000,000 MCF. Panhandle, one of the major pipeline companies in the field, contends that the market demand, as determined by the Commission, is unreasonably low and that it cannot take enough gas to meet the demand of its market.

We find nothing in the record to indicate that the Commission acted arbitrarily and capriciously in determining the market demand for the field.

Appellees contend that the Commission unlawfully changed its method of determining allowables.

The only change the Commission made in determining allowables was that it ceased adding over production from wells for the preceding month to the current allowables and ceased deducting under production of wells for the preceding month from the current allowables.

It is clear that the method which the Commission used in determining market demand and calculating allowables prior to 1956, did not permit the producers to supply the market demand for gas in the Kansas-Hugoton Field and drove the pipeline companies to other fields to obtain a sufficient supply for their customers. It is clearly established by the record that from time to time during the period of 1944 to 1956, every pipeline in the field at one time or another required additional substantial amounts of gas to supply their added markets but that the gas could not be obtained from the Kansas-Hugoton Field because of the Commission's method of determining market demand and calculating allowables and that they were therefore forced to go to other fields for their supply. Counsel for Northern Natural stated in oral argument before this court that the company had at times taken on additional territory requiring a substantial amount of additional gas but that because the market could not be

supplied from the Kansas-Hugoton Field, under the Commission's orders, they went to other sources of supply for their requirements.

Later, and in accordance with its Report and Order effective February 1, 1958, the Commission ceased deducting underages occurring from well which had not produced the previous months allowable and by so doing arrived at an allowable which represented the true demand for gas in the field.

There is nothing in the Gas Conservation Statute nor in the Commission's basic order which authorizes the Commission to deduct past underages from current allowables which were determined to be necessary to supply the market demand. Such a practice would permit, and did permit, one major pipeline company to reduce its takes and force the same reduction on every other pipeline company in the field regardless of the market demand requirements as a whole.

The Commission stated the fallacy in the old method of determining current allowables and set out the proper formula to be followed in its Report and Order effective February 1, 1958:

> "The market demand figure, once obtained, heretofore was used to determine the current allowable to be assigned by the Commission to the field. Prior to May, 1956, the current allowable was determined by taking the market demand, first adding thereto the cancelled underages for the previous month and then subtracting therefrom the amount of underproduction or adding thereto the amount of overproduction for the previous month. The result of the use of this method was that in actuality the runs or takes from the field controlled the amount of the current allowable; the control of the market demand and current allowable was entirely exclusively in the hands

of the purchaser pipeline companies, and not in the Commission.

"The Commission, in an effort to take control, deviated from this formula of determining current allowables and for August, 1956, and subsequent months has fixed current allowables by taking the market demand figures, still based exclusively on nominations of the purchasers, and adding thereto the cancelled underproducion for the previous month. Actually, except for the consideration of a small amount of cancelled underproduction, the market demand, based solely on the nominations of the purchasers, was the current allowable for the field. The current allowable for each well was calculated in accordance with the provisions of paragraph (1) of the Basic Order for the Hugoton Gas Field. Each well continued to carry in addition to its current allowable such underproduction or overproduction as may have accrued to it. The result was the net allowable for each well. The sum total of the net allowables of the wells therein represented the net allowable for the entire field.

"To restate this formula, allowables in the future will be determined as follows: Consider the factors as discussed in paragraph 16 above and arrive at the market demand figure; add to it the cancelled underages, and the result will be the current monthly allowable. (This is the amount that is ratably apportioned to the wells each month.) To ascertain the net allowable for the field as a whole, add the total net underage or subtract the total net overage. The resulting figure is the field total net allowable on that date.

"The field as a whole is never exactly in balance. It is to be expected that for some periods of time it will have a total net underage and for other periods of time it will have a total net overage."

Much confusion has arisen because of misuse or misunderstanding of descriptive terms. The briefs of appel-

lees in setting out comparative schedules for the court's consideration confuse nominations with the Commission's finding of market demand and confuse current allowables with net allowables.

The current allowable, which is spread to all of the wells in the field, consists of the market demand as found by the Commission plus cancelled underages for the previous month. The practice of adding cancelled underages is in accordance with the basic order and does not appear to be challenged.

The net allowable consists of the current allowable plus underages pertaining to specific wells which have not been cancelled. Such underages have been allocated in past months and was only available to the wells to which it was previously allocated. Such wells have an opportunity to produce the underage in addition to the current allowable if they can do so before the specified time for cancellation.

The Commission's method of determining current allowables, as stated above, complies with the law and the basic order.

The appellees contend that the Commission was influenced in its determinations by the fact that gas from the Kansas-Hugoton Field was draining or would drain into the Guymon-Hugoton Field in Oklahoma, and be wasted or lost insofar as the Kansas well owners and royalty owners are concerned. This was a proper matter for the Commission to consider under the circumstances.

The Commission found, and there was ample evidence to support the findings, that because of its past methods of determining market demand and calculating allowables, the producers in the Kansas-Hugoton Field had not been able to produce the market demand and the pipeline com-

panies had been forced to go to other fields, including the Guymon-Hugoton Field, to supply their market. The gas in the Guymon-Hugoton Field was being depleted and the pressure was declining at a much faster rate than in the Kansas-Hugoton Field. Drainage is bound to result.

This court would not place its approval on an order of the Commission which had as its purpose the drainage of gas from Oklahoma into Kansas. However, the Commission should not be criticized for correcting an improper method of establishing allowables which created a situation under which Kansas gas was caused to drain into Oklahoma.

There is no quarrel or conflict of jurisdiction between the two states. The Oklahoma authorities have done nothing to create the unfortunate situation which exists in the Kansas-Hugoton Field. The situation was created by the allowable orders of the Kansas Commission and should be corrected by it insofar as reasonably possible under the law.

The appellees contend that the change in the Commission's method of calculating allowables will cause inequitable or unfair taking among the producers in the field. The right of the pipeline companies to challenge matters which do not affect them but affect only the producers and royalty owners is somewhat questionable. The producers have not participated in the litigation, but the royalty owners have filed extensive briefs in support of the Commission's orders. We will, however, discuss the contention.

The Commission has three responsibilities under the Gas Conservation Statute. It must first of all prevent waste of the natural resource. It must allow sufficient production to meet the market demand if such can be done without waste. It must protect correlative rights.

In a gas field such as the Kansas-Hugoton where five major companies are taking gas through separate pipelines not connected to the same wells, the responsibilities placed upon the Commission will clash. If the market demand cannot be supplied without waste, or if correlative rights cannot be protected without waste, or if correlative rights cannot be protected without unduly restricting production needed for the market demand, one of the three, waste, market demand, or correlative rights, must suffer. The dominant purpose of the Gas Conservation Statute is to prevent waste. (*Kansas-Nebraska Natural Gas Co. v. State Corporation Commission*, 169 Kan. 722, 222 P. 2d 704.)

The Commission cannot require or guarantee that each well owner will produce and sell his entire allowable. The Commission is required to afford each owner the "right or opportunity" to produce his share. As far as the Commission's duty under the basic order goes, it is fulfilled when each owner is legally "free to produce" and not denied the "right or opportunity" to produce his allowable.

The Commission could not be required to shut in an entire gas field to protect correlative rights where some of the producers desired to cease production and hold a gas field for a reserve. The Commission could not be required to unduly restrict production in a gas field because some producers desired to deplete the gas at a very low rate regardless of the reason.

When waste, market demand, and correlative rights are in conflict the Commission must determine which is to be given preference. If the decision of the Commission is supported by evidence, the courts cannot interfere.

The orders of the Commission, under consideration, are not subject to the objection that they do not properly

protect correlative rights under the facts disclosed by the record.

The appellees contend that the orders of the Commission violate the commerce clause of the federal constitution and the Natural Gas Act.

Our attention is called to the fact that the subject of regulating interstate commerce is committed by the United States Constitution to the control of the federal government. (*Oklahoma* v. *Kansas Nat. Gas Co.*, 221 U. S. 229, 55 L. Ed. 716, 31 S. Ct. 564; *Penna.* v. *West Virginia*, 262 U. S. 553, 67 L. Ed. 1117, 43 S. Ct. 658; and *Penna. Gas Co.* v. *Pub. Service Comm.*, 252 U. S. 23, 64 L. Ed. 434, 40 S. Ct. 279.) Also, that the states have no authority, even in the absence of federal legislation, to regulate sales of gas for transportation and resale in interstate commerce. (*Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, 68 L. Ed. 1027, 44 S. Ct. 544; *Pub. Util. Comm.* v. *Attleboro Co.*, 273 U. S. 83, 71 L. Ed. 549, 47 S. Ct. 294; and *State Comm'n* v. *Wichita Gas Co.*, 290 U. S. 561, 78 L. Ed. 500, 54 S. Ct. 321.) We are further informed that the states cannot so regulate under its police power as to place an undue burden on interstate commerce. (*Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, 66 L. Ed. 239, 42 S. Ct. 106; and *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 66 L. Ed. 458, 42 S. Ct. 244.)

No one appears to question these general propositions of law. However, they are not applicable here. The Commission's orders are not directed to the pipeline companies. The pipeline companies are not required to do anything, neither are they restricted in any way. None of the pipeline companies, except Panhandle, claim they are not able to take enough gas under the Commission's order to meet their present market demands. Panhandle is before this court in support of the Commission's action.

The facts in this case present a much different situation than those which existed in *Northern Natural Gas Co. v. State Corp. Comm'n of Kansas*, 372 U. S. 84, 9 L. Ed. 2d 601, 83 S. Ct. 646. In the Northern Natural Gas case the Commission's order was directed to the pipeline company in an attempt to force it to take gas ratably from the wells to which it was connected in the Kansas-Hugoton Field.

The Commission's orders now before us are addressed only to the producers. The producers are not complaining and the royalty owners are supporting the Commission's action. The Commission's orders in no way attempt to regulate the sale or transportation of gas. The Supreme Court of the United States clearly stated the applicable law in *Champlin Rfg. Co. v. Commission*, 286 U. S. 210, 76 L. Ed. 1062, 52 S. Ct. 559:

> "Plaintiff contends that the Act and proration orders operate to burden interstate commerce in crude oil and its products in violation of the commerce clause. [U. S. Const. art. I, § 8.] It is clear that the regulations prescribed and authorized by the Act and the proration established by the commission apply only to production and not to sales or transportation of crude oil or its products. Such production is essentially a mining operation and therefore is not a part of interstate commerce even though the product obtained is intended to be and in fact is immediately shipped in such commerce. *Oliver Iron Co. v. Lord*, 262 U. S. 172, 178. *Hope Gas Co. v. Hall*, 274 U. S. 284, 288. *Foster Packing Co. v. Haydel*, 278 U. S. 1, 10. *Utah Power & Light Co. v. Pfost*, supra. No violation of the Commerce clause is shown." (p. 235.)

Appellees contend:

> "It is abundantly clear . . . that the jurisdiction over sales of natural gas for resale in interstate com-

merce pursuant to the National Gas Act is exclusively in the Federal Power Commission. The Natural Gas Act was passed pursuant to the Commerce Clause contained in the United States Constitution and obviously was intended to occupy the entire area—the area involved in the instant appeals."

The Natural Gas Act and the decisions do not support the contention. Congress has not occupied the field in the area of state control of the production of natural gas. The Natural Gas Act specifically exempts from its coverage the production or gathering of natural gas. (15 U.S.C.A. § 717b.).

In *Panhandle Pipe Line Co.* v. *Comm'n*, 332 U. S. 507, 92 L. Ed. 128, 68 S. Ct. 190, the court reviewed the legislative history of the Natural Gas Act and said:

". . . Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale." (p. 516.)

The court further said:

"Moreover, this unusual legislative precision was not employed with any view to relieving or exempting any segment of the industry from regulation. The Act, though extending federal regulation, had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it in the gap created by the prior decisions." (p. 517.)

The regulation of the production of gas was clearly left within the jurisdiction of the states.

The appellees last contend that the orders of the Commission violate the fourteenth amendment to the United States Constitution which provides, ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ." and article I, section 10 which provides, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ."

Appellee's contention appears to be bottomed on the proposition that they have contracts to purchase the gas produced from certain leases in the field and they therefore have the right to determine the allowable production therefrom through their nominations, without interference by the Commission. Also, that their gas purchase contracts have various provisions which may be affected if their ability to determine the allowables is disturbed.

Individuals cannot by private contracts destroy the right of the state to exercise reasonable police power for the welfare of the public. It has been said, ". . . that an exercise of public policy cannot be resisted because of conduct or contracts done or made upon the faith of former exercises of it, upon the ground that its later exercises deprive of property or invalidate those contracts. *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467 [55 L. Ed. 297, 31 S. Ct. 265, 34 L.R.A. (N.S.) 671.]" (*Thornton* v. *Duffy*, 254 U. S. 361, 369, 65 L. Ed. 304, 41 S. Ct. 137.) (See also, 16 C.J.S., §§ 180-182, 913 and 917, Constitutional Law, *Phillips Petroleum Co.* v. *Jenkins*, 297 U. S. 629, 80 L. Ed. 943, 56 S. Ct. 611; *Bennett* v. *Corporation Commission*, 157 Kan. 589, 142 P. 2d 810; *Champlin Rfg. Co.* v. *Commission*, 286 U. S. 210, 76 L. Ed. 1062, 52 S. Ct. 559, 86 A.L.R. 403.) The appellees do not complain that the production of gas is being over-regulated by undue restrictions. They rather complain that the field is being under-regulated. Private individuals cannot by private

contracts obtain a vested right in a police or public welfare statute. The Kansas Legislature could repeal the Gas Conservation Statute if it thought such action advisable.

There are no purchase contracts shown in the record. The standard gas purchase contracts which have been before this court contain a provision making the contract subject to all present and future valid orders of regulatory bodies.

There is no statute or provision in the basic order providing that, regardless of the evidence presented at the market demand hearings, the Commission must allow past under production to control future allowables. The Gas Conservation Statute and basic order both require the Commission to determine the market demand and establish current allowables based on the evidence presented at the market demand hearings.

The Commission is, and of necessity must be, free to correct past errors. Orders may have been entered with full confidence that they would effectuate the legislative mandate, but twelve years of irrefutable experience demonstrated that something was wrong.

In *Continental Investment Corp. v. State Corporation Comm.*, 156 Kan. 858, 137 P. 2d 166, this court said that:

> "... Of necessity all administrative rules of official boards are experimental, and their wisdom and justice or lack of it may only be revealed by trial and error. That is the main reason the legislature conferred on such official boards the power to make rules having temporarily the force of law. Otherwise there would be no excuse for the legislature placing that responsibility on an official board when the power and duty to legislate is vested in the legislature itself. The legislative device of assigning to official boards or commissions the powers to make administrative

rules governing matters of public concern, with authority to change those rules as experience may justify, is a settled policy in American jurisprudence. . . ." (p. 866.)

In reviewing another rule of the Commission, under the Gas Conservation Act, this court held that:

". . . [The] rules and regulations of the commission are never *res judicata*. Should bad consequences follow from such an order being made the commission might change it to meet conditions as they exist." (*Aylward Production Corp.* v. *Corporation Commission*, 162 Kan. 428, 440, 176 P. 2d 861.)

Furthermore, the orders before the Commission did not repeal or change its basic rules or regulations. There never was a rule containing the word "nominations," much less saying that nominations had to be accepted as the market demand. There never was a rule implying that the Commission was required to reduce its finding of market demand by the amount of past under-production.

We find nothing in the record which would justify the district court's judgment setting aside the orders of the Commission.

The judgment is therefore reversed with instructions to dismiss the petitions for review challenging the allowable orders of the Commission for gas production in the Kansas-Hugoton Field entered prior to and including October, 1957, and with directions to approve the allowable orders entered during the period November, 1957, through January, 1959, inclusive.

APPROVED BY THE COURT.

APPENDIX "C"

Judgments of the District Court of Finney County, Kansas, in the Second Set of Appeals

JOURNAL ENTRY AND JUDGMENT

The above captioned matter, consisting of consolidated cases filed by Colorado Interstate Gas Company, Nos. 10,744, 10,745, 10,755, 10,773, 10,783, 10,796 and 10,805; Northern Natural Gas Company, Nos. 10,746, 10,747, 10,754, 10,774, 10,784, 10,795 and 10,806; Cities Service Gas Company, Nos. 10,748, 10,749, 10,757, 10,790, 10,794, 10,801 and 10,813; and Kansas-Nebraska Natural Gas Company, Nos. 10,765, 10,766, 10,767, 10,787, 10,800, 10,804 and 10,814; came on for hearing before The Honorable Roland H. Tate, Judge of the District Court of Finney County, Kansas, on the petitions for judicial review filed by the respective parties as hereinbefore indicated, on the 24th day of February, 1960.

Colorado Interstate Gas Company appears by Malcolm Miller and Stuart R. Carter, of Wichita, Kansas, and Daniel R. Hopkins and Ray H. Calihan, of Garden City, Kansas. Northern Natural Gas Company appears by Mark H. Adams and Mark H. Adams, II, of Wichita, Kansas, and Daniel R. Hopkins and Ray H. Calihan, of Garden City, Kansas, and Jack C. Osborne, of Omaha, Nebraska. The State Corporation Commission appears by J. Robert Wilson, General Counsel, and S. F. Flesker and John Townsend, Assistant General Counsel. Panhandle Eastern Pipe Line Company appears specially for the purpose of objecting to the jurisdiction of the Court by Charles Vance and C. C. Linley of Liberal, Kansas, and the Southwest Kansas Royalty Owners Association appears specially for the purpose of objecting to the jurisdiction of the Court by Dale M. Stucky, Hugo T. Wendell and Robert T.

Cornwell, of Wichita, Kansas. Kansas-Nebraska Natural Gas Company appears by Douglas Gleason, of Ottawa, Kansas, and James D. Conway and Elmer J. Jackson, of Hastings, Nebraska. Cities Service Gas Company appears by Joe Rolston, Oklahoma City, Oklahoma, and Lang & Wallace of Scott City, Kansas.

Thereafter, it is stipulated that all of the cases hereinbefore mentioned may be heard at this time on a common record and consolidated under No. 10,744 in this court.

Colorado Interstate Gas Company objects to the special appearances of Panhandle Eastern Pipe Line Company and Southwest Kansas Royalty Owners Association, and Northern Natural Gas Company joined in the objection, and such objections were taken under advisement by the Court.

Thereafter, Panhandle Eastern Pipe Line Company offered evidence in support of its objection to the jurisdiction, and the objection to jurisdiction of Panhandle Eastern Pipe Line Company and the motion of the Southwest Kansas Royalty Owners Association to dismiss were overruled by the Court.

Thereafter, the State Corporation Commission presented a motion for change of venue and a motion to dismiss, which were overruled by the Court.

Thereafter, the motion of Panhandle Eastern Pipe Line Company for a stay was overruled by the Court.

Thereafter the motion of Panhandle Eastern Pipe Line Company for special findings of fact and conclusions of law was argued and overruled by the Court.

Thereafter, the Court overruled Southwest Kansas Royalty Owners Association's motion for a stay pending hearing of its appeal from the Court's order overruling its motion to dismiss.

Thereafter, the Court ruled that the only parties to the action were those named in the caption of the various actions consolidated herein and that Panhandle Eastern Pipe Line Company and the Southwest Kansas Royalty Owners Association were not parties to the action. The Southwest Kansas Royalty Owners Association and Panhandle Eastern Pipe Line Company did not thereafter participate in trial of the actions.

Thereupon, the Court heard the arguments presented by counsel for Colorado Interstate Gas Company, Northern Natural Gas Company and the State Corporation Commission and received at such times and thereafter, at times set by the Court, briefs and reply briefs, submitted by the respective parties.

Thereafter, and on the 26th day of May, 1960, the Court, being duly advised in the premises, and after considering the briefs, arguments and record filed herein,

Adjudges, Decrees and Determines:

That the report and order of the State Corporation Commission dated November 10, 1959, for the six months' proration period beginning October 1, 1959, and running through March 31, 1960, for the Kansas Hugoton Gas Field, is a proper, lawful and valid order and such order should be, and the same is hereby, affirmed.

The Court Further Decrees, Adjudges and Orders that the several monthly proration orders entered by the State Corporation Commission for October, 1959, monthly, through March, 1960, should be, and the same are hereby, reversed and set aside insofar as the net allowables there set forth are greater by virtue of underages, either canceled or carried forward as a result of the Commission's departing from its former method of determining allowables beginning May, 1956, to October 1, 1959; and such

monthly proration orders entered by the State Corporation Commission for the months of October, 1959, through March, 1960, are affirmed insofar as such orders disclose market demand and current allowables without adjustment to runs as determined by the Commission and net allowable determined by adding underage or subtracting overage from current allowable, so long as such underage or overage accrued since October 1, 1959; such reversal being in accordance with the previous judgments of this court, and particularly the judgment entered December 15, 1958, but not to extend such judgment past the Commission's determination under the amendment to the Gas Conservation Statute (G.S., 1959 Supp., 55-703) and the proceedings thereunder begun by the Commission effective October 1, 1959.

Thereafter, and on the 26th day of May, 1960, the motions for a new trial filed by Colorado Interstate Gas Company, Northern Natural Gas Company, Panhandle Eastern Pipe Line Company, Kansas-Nebraska Natural Gas Company, Cities Service Gas Company and the State Corporation Commission came on for hearing, and the Court, being duly advised in the premises and after considering the arguments of counsel, denies all such motions for a new trial.

Thereafter, and on the oral motions of the parties to this litigation the Court finds that its judgment should be stayed pending appeals which various parties announce they contemplate and will promptly file.

The Court further decrees, adjudges and orders that the costs herein be taxed equally to Colorado Interstate Gas Company, Northern Natural Gas Company, Cities Service Gas Company, Kansas-Nebraska Natural Gas Company and the State Corporation Commission of the State of Kansas.

APPENDIX "D"

IN THE DISTRICT COURT OF STEVENS COUNTY, KANSAS.

SOUTHWEST KANSAS ROYALTY OWNERS' ASSOCIATION, Petitioner, vs. THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, Respondent.	Case No. 4105

Journal Entry

Now on this 13th day of February, a regular judicial day of the January, 1960 term, this action and the actions consolidated with it by order of the court, came on for trial pursuant to a setting made by the court on the first day of the term.

Petitioner appears by Dale M. Stucky, Robert Cornwell and A. E. Kramer, its attorneys; the Kansas Corporation Commission appears by J. Robert Wilson and John Townsend, its attorneys and Panhandle Eastern Pipe Line Company appears by C. C. Linley and Chas. Vance, its attorneys. All parties announce ready for trial; there are no other appearances.

The Court, having stated that Northern Natural Gas Company, Inc., Cities Service Gas Company and Colorado Interstate Gas Company did not appear on the first day of the term when the case was set for hearing, inquires whether any of said companies lacked actual notice of the order of this Court entered on February 6, 1960.

There is offered in evidence and ordered filed in the case the affidavit of Chas. Vance showing that certified copies of said Court order was mailed by certified mail to all parties and their attorneys on February 6, 1960; that the attached return receipts show delivery to all concerned on February 8, 1960. Thereupon counsel state to the Court that all parties and their attorneys had actual notice of this setting for trial on the merits by mail and otherwise. The court examines the files and finds that, although pleadings filed since the first day of the term appear to have been noticed for the first day of the March term, no application for a continuance has been made by any of the parties.

Thereupon the Court waits for one hour. There are no further appearances. The Court proceeds to hear the case upon argument of counsel and the transcript. At the conclusion thereof, it takes the same under advisement.

Thereafter, and on March 10, 1960, the Court, after being fully advised in the premises finds:

1. That, upon the Court's own motion, the orders made February 6, 1960, should be and the same are hereby set aside insofar as said orders affect and consolidate the cases pending in the Finney County District Court.

2. That the Report and Order dated November 10, 1959, and subsequent allowable orders of the State Corporation Commission are based on substantial competent evidence and are lawful and valid. Said report and order makes reasonable provisions for an orderly process correcting inequities (existing for more than ten years and which have progressively increased) discriminating in favor of the correlative rights of producers and royalty owners in the Oklahoma Hugoton Gas Field and against

those in the Kansas Hugoton Gas Field; as provided by the Statutes of Kansas, Section 55-703, 1959 supplement.

It Is Therefore Ordered, Adjudged and Decreed that the Report and Order dated November 10, 1959, and subsequent allowable orders of the State Corporation Commission be and they are hereby affirmed.

/s/ L. L. Morgan,
Judge, District Court.

APPENDIX "E"

BEFORE THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS

In the matter of determining the market demand for natural gas for the Hugoton Gas Field of Kearny, Finney, Grant, Haskell, Morton Stevens, Seward, Stanton and Hamilton Counties, Kansas, the deliverability and acreage attributable to each of the respective wells therein, and fixing gas production percentages and quotas for wells within said field for the proration period extending from October 1, 1959, to March 31, 1960, both inclusive.	Docket No. 61,366-C (C-7378) Conservation Division

Report and Order of the Commission

BY THE COMMISSION:

1. This proceeding is to determine the market demand for natural gas in the Kansas Hugoton Gas Field for the proration period of October 1, 1959, to March 31, 1960. Public hearings were duly held on September 25

and 30 and October 1 and 2, 1959, at Wichita, Kansas, at which appearances were entered on behalf of Colorado Interstate Gas Company, Cities Service Gas Company, Northern Natural Gas Company, Republic Natural Gas Company, Kansas-Colorado Utilities, Inc., Pan-American Petroleum Corporation, Southwest Kansas Royalty Owners Association, Panhandle Eastern Pipe Line Company, Kansas-Nebraska Natural Gas Company, Hugoton Production Company, and the Commission staff. Prior to said hearings the Commission requested that all purchasers of gas from the Hugoton Field submit nominations and furnish certain specified information to the Commission before the date set for the hearing. At the hearings on September 25 and 30 and October 1 and 2, 1959, the information so furnished, together with other evidence, was introduced into the record of this proceeding.

EVIDENCE AND FINDINGS OF FACT.

2. The Commission finds that no single formula can be used to ascertain the market demand for natural gas from the Kansas Hugoton Gas Field or any particular field, as the factors and conditions vary from period to period and from gas field to gas field. In fixing the market demand for the gas from a particular field for a fixed period of time, the Commission should consider all the evidence and recommendations. It would be unwise for the Commission to consider only the nominations submitted by the purchasing companies or the actual takes of gas from a particular field when other evidence submitted indicates that determination of market demand on that basis alone would result in ultimate loss or waste of gas by the premature abandonment of wells or discrimination against a particular gas field by the purchas-

ing companies. Nominations and runs are often controlled or influenced by contracts between the producers and purchasers. These contracts do not necessarily bear any relationship to the market demand for gas from the Kansas Hugoton Gas Field or any gas field, and they are not binding upon the Commission in carrying out its regulatory duties.

3. The nominations of the companies (estimates of their demands) from the Kansas Hugoton Gas Field for said six months' period are 277,801,541 M.c.f. at 14.65 p.s.i.a.

4. The information presented by the companies at the Commission's request shows for the year 1959 that Cities Service Gas Company, Northern Natural Gas Company, Panhandle Eastern Pipe Line Company, Colorado Interstate Gas Company, and Kansas-Nebraska Natural Gas Company expect to purchase gas from the Kansas Hugoton Field at a lesser rate, based on comparative gas reserves, than from their total reserves and that during the year 1959 Northern Natural Gas Company, Panhandle Eastern Pipe Line Company, and Kansas-Nebraska Natural Gas Company expect to take gas from the Oklahoma Hugoton Field (Guymon-Hugoton) at a greater rate, based on comparative gas reserves, than from the Kansas-Hugoton Field. The information also shows that the total markets of the purchasing pipeline companies have increased considerably over the past few years. We find that Kansas Hugoton has not received its fair share of these additional markets.

5. The testimony of Mr. Clifford R. Horn, witness for Panhandle Eastern Pipe Line Company, shows that if the five largest purchasers (purchasing pipeline com-

panies) were to take gas from the Kansas Hugoton Field at the same rate, based on comparative gas reserves, as they do from all sources to which they are connected, the Kansas Hugoton Gas Field's fair share of the markets would be 653,738,000 M.c.f. for a 12 month period. Analysis of actual runs over a 36 month period shows that 63.03 per cent of the yearly runs are taken in the six months from October to March. Based on this, the market demand for the current period should 412,051,000 M.c.f. This was the figure recommended by Mr. Horn.

6. Evidence was presented by Republic Natural Gas Company showing that the wells in the Kansas Hugoton Gas Field were capable of sustained production for many years at a rate considerably higher than the present rate of production. Testimony to this effect was given by Mr. William C. Goodson based on a study of actual runs of 146 wells running continuously for a two to four month period. Mr. William Hurst made a theoretical study applying known principles of physics and petroleum reservoir engineering to observed data. The testimony of Mr. Hurst substantiated the results obtained by Mr. Goodson. Both witnesses qualified as expert petroleum engineers and neither was contradicted.

7. Mr. Goodson also testified that the Kansas Hugoton Field has reserves of approximately 22 trillion cubic feet (22,000,000,000 M.c.f.). He recommended that the market demand be set at 800,000,000 M.c.f. per year, with 500,000,000 M.c.f. being allocated to the current six month period. This figure was based on a production rate compared to reserves in the Kansas Hugoton Field of four of the five major pipelines compared to the production rate from their total system reserves

8. Dr. Charles F. Weinaug, witness for the Southwest Kansas Royalty Owners Association, testified that the Kansas portion of the Hugoton Field is being produced at about half the rate that the Oklahoma portion is being produced. He also gave testimony indicating that unless the Kansas Hugoton Field were depleted at a much faster rate, an excessive number of wells will have to be redrilled due to corrosion of well casings.

9. There was no conflict in the evidence relating to drainage of gas from the Kansas Hugoton Field to the Oklahoma portion. Dr. Weinaug, who qualified as an expert witness in petroleum engineering, brought prior studies up to date and testified that between 2,000,000 M.c.f. and 8,000,000 M.c.f. of gas was draining from Kansas into Oklahoma per year. This testimony was substantiated in principle by the testimony of Mr. Hurst, a witness for Republic Natural Gas Company, and was directly substantiated by the testimony of Mr. F. M. Buxton, witness for Kansas-Nebraska Natural Gas Company. The Commission finds that the pressure differential between the wells in the Kansas portion of the Hugoton Field and the Oklahoma portion of the Hugoton Field is increasing, and that drainage is occurring from Kansas into Oklahoma.

10. Assuming the rate of production in Oklahoma to remain the same for the next six months, Dr. Weinaug testified that in order to prevent further drainage, the Kansas portion of the Hugoton Gas Field would have to produce 725,000,000 M.c.f. during the six month period. This would equalize the pressure on both sides of the Kansas-Oklahoma state line, and thus prevent further drainage into Oklahoma.

11. It is obvious that the prevention of drainage into Oklahoma, the prevention of unnecessary redrilling of

wells because of casing corrosion, and a fair share of the total system markets of the pipeline companies are goals to be sought after. It is just as obvious that these goals cannot be achieved in a short time without causing drastic effects in the industry. Therefore the Commission cannot effectuate the recommendations of Dr. Weinaug, and cannot adopt the recommendations of Mr. Horn and Mr. Goodson as to market demand. The Commission notes that past practices have succeeded in getting increased nominations and runs from the Kansas Hugoton Field. The nominations for the current period are 25,000,000 M.c.f. higher than for corresponding periods in recent years, and testimony of witnesses for the pipeline companies indicates that further increases in nominations and runs will occur in the future.

12. The Commission after considering all the evidence presented at the aforesaid hearings and the reasonable current requirements for current consumption and use within and without the state determines the market demand for gas from the Kansas Hugoton Field for the six months' period from October 1, 1959, to March 31, 1960, to be 281,000,000 M.c.f. at 14.65 p.s.i.a. The market demand for each month during this period is found to be:

October 1959	30,291,800	M.c.f.	14.65 p.s.i.a
November 1959	45,100,500	"	" "
December 1959	53,193,300	"	" "
January 1960	54,710,700	"	" "
February 1960	48,725,400	"	" "
March 1960	48,978,300	"	" "

13. In determining the market demand the Commission has considered the needs of each purchasing company for gas from Kansas Hugoton. Under this market demand figure Hugoton Production Company, Colorado Interstate

Gas Company, Kansas-Nebraska Natural Gas Company, Panhandle Eastern Pipe Line Company, Kansas-Colorado Utilities, Inc., Quinque Oil and Gas Producing Company, and Shallow Water Refining Company will all receive allowables less than their nominations. Only two companies, Cities Service Gas Company and Northern Natural Gas Company will receive allowables in excess of their nominations.

IT, IS, THEREFORE, BY THE COMMISSION ORDERED: That the market demand for the six months' period from October 1, 1959, to March 31, 1960, inclusive, be as set out in Finding No. 12 of this order.

BY THE COMMISSION IT IS SO ORDERED:

Wiles, Chm.; Beatty, Com.; Byrd, Com.

Raymond B. Harvey,

(Seal) Secretary.

November 10, 1959.

APPENDIX "F"

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the matter of determining the market demand for natural gas for the Hugoton Gas Field of Kearny, Finney, Grant, Haskell, Morton, Stevens, Seward, Stanton and Hamilton Counties, Kansas, the deliverability and acreage attributable to each of the respective wells therein, and fixing gas production percentages and quotas for wells within said field for the proration period extending from October 1, 1959, to March 31, 1960, both inclusive.	Docket No. 61,366-C (C-7378) Conservation Division

October Allowable Order

Now on this 20th day of November, 1959, the above-entitled matter comes before the Commission for consideration and determination of production allowable for wells in the Hugoton Gas Field for the month of October, 1959, and the Commission finds:

1. That after notice as provided by the statutes and rules and regulations, the above-entitled matter was heard by the Commission at Wichita, Kansas, on September 25 and 30, and October 1 and 2, 1959, evidence thereon taken and all parties afforded an opportunity to be heard.

2. That the Commission has heretofore determined the market demand for gas from the Kansas Hugoton Gas Field for the month of October, 1959, to be 30,291,800 M.c.f. at 14.65 pounds p.s.i.a.

3. That no evidence was produced at said hearing to show that waste would result or correlative rights would be violated if the wells in the Kansas Hugoton Gas Field were allowed to produce this market demand.

4. That production in excess of said market demand of 30,291,800 M.c.f. plus or minus net underages or overages and cancelled underages would result in waste as that term is defined by the Statutes of the State of Kansas; that under the Basic Order No. 44-3-21 entered in Docket No. C-164, as amended, the current allowable for any given period consists of the reasonable market demand for that period plus the cancelled underage for the prior month of record, and that after giving effect to such cancelled underage as shown by the records of the Commission as of October 1, 1959, the current allowable for the month of October, 1959, should be fixed at 35,073,284 M.c.f.; that the net allowable for any given period consists of the current allowable for that period plus or minus the net underages or overages as the case may be, and that after giving effect to such underages or overages as shown by the records of the Commission as of October 1, 1959, the resulting net allowable for October, 1959, is 165,309,014 M.c.f.; that in order to prevent waste the production of natural gas from said common source of supply should be restricted or limited to said amount for said period.

5. That in order to protect the respective correlative rights of the producers and other interested parties having a right to withdraw gas from the common reservoir and in order to permit the wells and leases therein to currently produce proportionately so that each may ultimately produce approximately the amount of gas underlying it, production quotas for the several developed leases and wells should be established during said period in accordance

with the Basic Order No. 44-3-21 entered in Docket No. C-164, as amended.

6. That the acreage attributable to and the individual well deliverability factors of the several wells in said field are in the amounts and figures as set out in the October, 1959, allowable report which is attached hereto, marked Exhibit "A" and hereby referred to and made a part hereof by reference; that the allocation of the allowed production within and between the wells in said common source of supply and the individual well production quotas should be made and established in the manner and form prescribed in said Basic Order No. 44-3-21, entered in Docket No. C-164, as amended, and when so made and established are in the amounts and figures as set out in said schedule Exhibit "A".

7. That such allowable should constitute the maximum permissible production from such wells and leases for the period covered by this order.

IT IS THEREFORE, BY THE COMMISSION ORDERED: That the current allowable for natural gas from the Hugoton Gas Field located in Kearny, Finney, Grant, Haskell, Morton, Stevens, Seward, Stanton and Hamilton Counties, Kansas, for the month of October, 1959, be and it is hereby established at 35,073,284 M.c.f. The resulting total net allowed production of natural gas from said field for said month of October, 1959, is 165,309,014 M.c.f. and the same is hereby allocated among the several developed leases and wells in said field in the manner prescribed by said Basic Order No. 44-3-21 entered in Docket No. C-164, as amended, and when so distributed, each well's production quota is in the amount set out in the schedule, Exhibit "A" attached hereto; that production of natural gas from said common source of supply and

from each of the developed wells and leases therein shall be limited during the period covered hereby to the respective allowables established for the said field and each of the wells therein.

IT IS FURTHER ORDERED: That the acreage and deliverability factors and current position of the wells as set out in schedule Exhibit "A", attached to this order, be, and the same are hereby adopted and established.

The Commission retains jurisdiction of the subject matter and the parties for the purpose of entering such further order or orders as from time to time it may deem proper.

BY THE COMMISSION IT IS SO ORDERED.

Wiles, Chm.; Beatty, Com.; Byrd, Com.

Raymond B. Harvey,
Secretary.

(Seal)

JRT:fr

APPENDIX "G"

IN THE DISTRICT COURT OF FINNEY COUNTY, KANSAS.

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC. Petitioner, vs. THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, HARRY G. WILES, Chairman, MARION BEATTY and RICHARD C. BYRD, as Members of said Commission and their respective successors in office, Respondent.	No. 10,765

Petition for Judicial Review

Comes now the Petitioner, Kansas-Nebraska Natural Gas Company, Inc. (Kansas-Nebraska) and petitions this Court for a review of the action of the Respondents, The State Corporation Commission Of The State Of Kansas and the Chairman and members thereof, as hereinafter named (Commission) in entering a certain Report And Order Of The Commission (Report And Order) under date of November 10, 1959 in the Commission's Docket No. 61,366-C (C-7378) and for a review of the contents of said Report And Order. In support of this Petition For Judicial Review, Petitioner alleges and states to the Court as follows:

1. Kansas-Nebraska is a Kansas Corporation engaged in the transportation and sale of natural gas in both intrastate and interstate commerce. It is the owner of a number of gas leases on land located in the Kansas Hugoton

Gas Field and is a substantial producer, gatherer, processor and purchaser of natural gas from that field. Kansas-Nebraska is a natural gas company as defined by the Natural Gas Act, as amended, (15 USCA 717 et seq.) and as such is subject to the jurisdiction of the Federal Power Commission. Petitioner is also a natural gas public utility certificated by the Respondent to serve as such within the State of Kansas. Petitioner relies heavily upon the supplies of natural gas available from the Kansas Hugoton Field, both from its own reserves and from reserves owned by others and dedicated to Kansas-Nebraska under gas purchase contracts, for its ability to serve its customers both within and outside the State of Kansas and the Report And Order herein complained of, adversely affects this ability.

2. Respondent, the State Corporation Commission of the State of Kansas, is the administrative body authorized by the Legislature to administer the Kansas statutes governing the production and conservation of natural gas (G.S. 1949, 55-701 et seq., as amended). Harry G. Wiles is Chairman and Marion Beatty and Richard C. Byrd are members of said Commission.

3. This action is brought pursuant to the authority of G.S. 1949, 55-707 and 55-606 for a Judicial Review of proceedings had before the Commission in its Docket 61,366-C (C-7378) and of the Report And Order dated November 10, 1959 entered therein. A full and complete transcript of the proceedings had in said docket, together with all exhibits introduced therein, is being filed with this Court and is made a part of this Petition For Judicial Review by reference thereto. Kansas-Nebraska was a party to the above described proceedings. Within the time prescribed by statute, following receipt of the Report And

Order, Kansas-Nebraska filed its Petition For Rehearing with the Commission. The Petition For Rehearing was denied by order of the Commission on December 16, 1959. A copy of the Report And Order and a copy of Kansas-Nebraska's Petition For Rehearing, marked Exhibits "A" and "B", respectively, are attached to and made a part of this petition.

4. The Report And Order entered by the Commission is unreasonable for the following reasons:

(a) The Commission wholly disregarded the evidence presented in good faith through a competent expert witness, as to what constitutes the market demand for natural gas from the Kansas-Hugoton Field as the term "market demand" is used in G.S. 1949, 55-703, as amended. (T. 14).

(b) The Commission found in paragraph 2 of the Report And Order that it

> "would be unwise . . . . . to consider only the nominations . . . . . or the actual takes of gas . . . . . when other evidence submitted indicates that determination of market demand on that basis alone would result in ultimate loss or waste of gas by the premature abandonment of wells or discrimination against a particular field by the purchasing companies."

The Commission, though it made no finding that premature abandonment or discrimination would result if the market demand was measured by the nominations or takes of gas only, proceeded to find the market demand to be greater than it would have been if determined on the basis of nominations or takes. No reason was given by the Commission for its departure in this proceeding from nominations or takes as the measure of marke demand.

(c) The Commission's finding that the market demand for gas from the Kansas Hugoton Field for

the six months' period from October 1, 1959, to March 31, 1960, was 281,000,000 MCF at 14.65 PSIA and its apportionment of that demand by months for the six month's period is wholly unsupported by any evidence in the record. Estimates of market demand, in excess of the total of the nominations, presented at the hearing by Mr. Horn, Mr. Goodson and Dr. Weinaug (see paragraphs 3 through 10 of the Report And Order), were all shown in the record to be not estimates of market demand at all, but actually estimates of the rates of production required to accomplish specific objectives, unrelated to the market demand issue, which the named witnesses deemed desirable. (T. 395, 421, 496, 606).

(d) The Commission states that its determination of market demand resulted from its consideration of,

> " . . . . . all the evidence presented . . . *and the reasonable current requirements for current consumption and use within and without the state* . . . . . "
> (Paragraph 12, Report And Order).

The Commission in the Report And Order, made no reference to any evidence which shows what such reasonable current requirements are. It made no finding as to the amount of such requirements or the relationship of such requirements to the market demand for gas from the Kansas Hugoton Field. The Commission did not reveal the extent to which such undisclosed requirements (or any of the evidence for that matter) entered into its determination of market demand.

(e) The findings made by the Commission (1) that there was no conflict in the evidence relating to drainage of gas from the Kansas to the Oklahoma portion of the Hugoton Field, and (2) that Dr. Weinaug's testimony was substantiated in principle by Mr. Hurst and "directly substantiated" by Mr. Bux-

ton (Report And Order, paragraph 9) are unsupported by and contrary to the evidence. Mr. Hurst declined to answer questions directly bearing on this issue (T. 557-559) and Mr. Buxton prefaced his testimony by stating if he were to determine whether there was migration of gas he would not use the method employed by Dr. Weinaug. He stated that "based upon the method of solution used by Dr. Weinaug" he had determined the amounts of migration across the state line. He stated that his calculations, using the Weinaug method, showed substantially greater amounts of migration of gas from Oklahoma to Kansas than from Kansas to Oklahoma. (T. 763-766).

(f) The Commission's findings (paragraphs 2, 4, 5, 6, 7, 8, 9 and 10 of the Report And Order) recognize only the testimony and objectives of those urging the Commission to establish higher rates of allowable production as opposed to determining the market demand. In paragraph 11 of the Report And Order, The Commission expresses its belief that attainment of such objectives is desirable "to be sought". All of the findings accord some merit to the testimony of those witnesses who have supported higher rates of production and all ignore the sound reasons advanced by those witnesses who know, from long experience, that "market demand" is a term with a real and well established meaning. The Report And Order traces the pattern from which future orders granting even larger allowables can be cut. It denotes the Commission's determination to depart from actual market demand, as the measure of allowable production and to rely instead upon the rates of production required from time to time to accomplish specific economic objectives unrelated to the extent of the demand for gas.

5. The Report And Order entered by the Commission is unlawful for the following reasons:

(a) The Commission failed to obey the mandate of G.S. 1949, 77-201, *Second*, by refusing to construe the

term "market demand" according to the context and the approved usage of the language.

(b) The Commission, in refusing to regard the nominations or actual runs as the measure of the market demand for gas from the field, has departed from the construction universally accorded G.S. 1949, 55-703, by the Commission and all others who dealt with or had any responsibility for market demand determinations and the proration process from early in 1944 until May of 1956.

(c) By finding that the market demand is an amount not supported by or referred to in any testimony, the Commission has actually created rather than measured or determined the market demand. This is clearly a violation of the Commission's statutory duty.

(d) The Commission's findings are not adequate to disclose the reasons for or the process by which the Commission arrived at its ultimate determination of market demand.

(e) By concerning itself in a market demand hearing with "drainage into Oklahoma" and by receiving and considering recommendations that it establish an allowable requiring rates of production which would equalize pressures of the wells in the Kansas and Oklahoma portions of the Hugoton Field, the Commission has ignored the legislature's definition of "common source of supply" in G.S. 1949, 55-702, the definition of that same term contained in the Basic Order for the Hugoton Field and in the Commission's own rules (Rule # 82-2-20).

(f) By establishing a market demand in excess of the total amount of gas required by all the companies, with the knowledge that one company would be able to take the full amount of the resulting allowables assigned the wells to which it is connected and

that none of the other companies could take the allowables assigned the wells to which they are connected, the Commission caused or knowingly permitted the unfair and inequitable taking of gas prohibited by the statute, G.S. 1949, 55-703, as amended.

(g) If the Commission is found to have properly and fully observed all statutory requirements set forth in G.S. 1949, 55-703, as amended, in arriving at its conclusion as to the amount of "market demand," then the said statute constitutes an unconstitutional delegation of legislative authority for the reason that it does not prescribe a reasonable standard or guide by which the limits of the Commission's authority and the propriety of the Commission's determinations can be measured. (Section 1 of Article II of the Kansas Constitution and the 14th Amendment to the Constitution Of The United States).

(h) If the statute, G.S. 1949, 55-703, is construed to empower or authorize the Commission to perform its market demand determination and proration functions, as it has in this proceeding, in a manner designed ultimately to arbitrarily reduce the amount of gas which Kansas-Nebraska is able to take from sources outside Kansas because it must take more gas from the Kansas Hugoton Field, or to require the construction of additional facilities to serve customers with gas from the Kansas Hugoton Field who are now being served from other sources with adequate existing facilities, then the said statute violates the 14th Amendment to the Constitution Of The United States.

(i) If the statute, G.S. 1949, 55-703 is construed to authorize the Commission to perform its market demand and proration functions, as it has in this proceeding, in such manner as ultimately to interfere with Kansas-Nebraska's rights to secure and maintain sufficient reserves of natural gas, wherever the said reserves may be located, and to draw upon said reserves in the manner and to the extent necessary to

serve its interstate and other markets and to efficiently and continuously perform its duties under the law as a public utility, (subject only to having production from any source limited in the interest of conservation, prevention of waste and protection of correlative rights) then the said statute (1) permits the Commission to enter into an area of regulation already occupied by the Federal Power Commission, an agency of the government of the United States, operating under authority of the Natural Gas Act, (2) constitutes an unwarranted interference with and burden upon interstate commerce, and (3) permits an unwarranted interference, under the guise of regulation, with the exercise of private rights, particularly the rights of the corporation to have its own officers make decisions respecting its property and other matters which neither the state nor the federal government have declared to be within the purview of legitimate public concern. (Article 1, Section 8 of and the 14th Amendment to the Constitution of The United States).

WHEREFORE, the Petitioner, Kansas-Nebraska Natural Gas Company, Inc., respectfully prays that the Court find and rule generally in favor of the Petitioner and against the Respondents; that the Court enter its judgment vacating and setting aside the Report And Order Of The Commission for the reasons that it is unreasonable and unlawful; and that the Court grant to Petitioner such other and further relief as the Petitioner may be entitled to have in this proceeding.

Respectfully submitted,

Kansas-Nebraska Natural Gas Company, Inc.

/s/ James D. Conway
/s/ Elmer J. Jackson
/s/ Douglas Gleason

Attorneys for Petitioner,
Kansas-Nebraska Natural
Gas Company, Inc.

APPENDIX "H"

IN THE DISTRICT COURT OF FINNEY COUNTY, KANSAS.

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC.
Petitioner,
vs.
THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, HARRY G. WILES, Chairman, MARION BEATTY and RICHARD C. BYRD, as Members of said Commission and their respective successors in office,
Respondent.

No. 10,766

Petition for Judicial Review.

Comes now the Petitioner, Kansas-Nebraska Natural Gas Company, Inc., (Kansas-Nebraska) and petitions this Court for a review of the action of the Respondents, The State Corporation Commission Of The State Of Kansas and the Chairman and members thereof, as hereinafter named (Commission) in entering a certain October Allowable Order (Allowable Order) under date of November 20 1959, in the Commission's Docket No. 61,266-C (C-7378) and for a review of the contents of said Allowable Order In support of this Petition For Judicial Review, Petitioner alleges and states to the Court as follows:

1. Kansas-Nebraska is a Kansas corporation engaged in the transportation and sale of natural gas in both intrastate and interstate commerce. It is the owner of a num-

ber of gas leases on land located in the Kansas Hugoton Gas Field and is a substantial producer, gatherer, processor and purchaser of natural gas from that field. Kansas-Nebraska is a natural gas company as defined by the Natural Gas Act, as amended (15 USCA 717 et seq.), and as such is subject to the jurisdiction of the Federal Power Commission. Petitioner is also a natural gas public utility certificated by the Respondent to serve as such within the state of Kansas. Petitioner relies heavily upon the supplies of natural gas available from the Kansas Hugoton Field, both from its own reserves and from reserves owned by others and dedicated to Kansas-Nebraska under gas purchase contracts, for its ability to serve its customers both within and outside the state of Kansas and the Allowable Order, herein complained of, adversely affects this ability.

2. Respondent, the State Corporation Commission of the State of Kansas, is the administrative body authorized by the Legislature to administer the Kansas statutes governing the production and conservation of natural gas (G.S. 1949, 55-701 et seq., as amended). Harry G. Wiles is Chairman and Marion Beatty and Richard C. Byrd are members of said Commission.

3. This action is brought pursuant to the authority of G.S. 1949, 55-707 and 55-606 for a Judicial Review of Proceedings had before the Commission in its Docket 61,366-C (C-7378) and of the October Allowable Order dated November 20, 1959, entered therein. A full and complete transcript of the proceedings had in said docket, together with all exhibits introduced therein, is being filed with this Court and is made a part of this Petition For Judicial Review by reference thereto. Kansas-Nebraska was a party to the above described proceedings. Within the time prescribed by statute, following receipt of the October Allow-

able Order, Kansas-Nebraska filed its Petition For Rehearing with the Commission. The Petition For Rehearing was denied by order of the Commission on December 16, 1959. A copy of the October Allowable Order and copy of Kansas-Nebraska's Petition for Rehearing marked Exhibits "A" and "B" respectively, are attached to and made a part of this Petition.

4. The October Allowable Order is based upon and is intended to implement the Report and Order of the Commission entered in the same Commission Docket on November 10, 1959. In the Report and Order the Commission established the total market demand for gas from the Kansas Hugoton Field for the six months period from October 1, 1959 to March 31, 1960, and the market demand for each of those six months. In the Report and Order, the Commission makes certain findings and states certain conclusions which are presumably intended to support its establishment of the market demand in total and by months. Because the October Allowable Order is based upon and is intended to implement the Report and Order the said Allowable Order is unreasonable and unlawful in all the respects that the Report and Order is unreasonable and unlawful. Petitioner has this day filed in this Court a Petition for Judicial Review in which is set forth the particular respects in which the Report and Order is unreasonable and unlawful. A copy of the Petition for Judicial Review directed to the Report and Order is marked Exhibit "C" and is attached to and made a part of this Petition. Kansas-Nebraska hereby incorporates in this Petition For Judicial Review by reference to the Petition For Judicial Review directed to the Report and Order (Exhibit C), the same as though fully set forth herein, all the statements contained therein which describe the partic-

ulars in which the said Report and Order is unreasonable and unlawful. Kansas-Nebraska states that the Allowable Order is unreasonable and unlawful for all of the reasons set forth in the said statements incorporated herein by reference.

5. In addition to the reasons set forth in the statements incorporated by reference, the said Allowable Order is unreasonable for the further reason that it fixes the net allowable production for the month of October, 1959 at 165,309,014 MCF without hearing or considering any evidence and without making any finding that such volume of gas could be produced without waste and without injury to correlative rights of persons having the right to produce gas from the Kansas Hugoton Field.

WHEREFORE, Petitioner, Kansas-Nebraska Natural Gas Company, Inc. prays that this Court enter its order staying the enforcement of the said October Allowable Order, pending completion of the judicial review instituted by this Petition, and, after this Court has reviewed the action and order of the Commission, that it enter its judgment herein setting aside the October Allowable Order dated November 20, 1959 for the reasons that it is both unreasonable and unlawful and granting to Petitioner such other and further relief as the Court may deem proper.

Respectfully submitted,

Kansas-Nebraska Natural Gas Company, Inc.

James D. Conway
Elmer J. Jackson
Douglas Gleason

Attorneys for Petitioner, Kansas-Nebraska Natural Gas Company, Inc.

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FILED
AUG 10 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 140

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., a Corporation,
Appellant,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION, AND PANHANDLE EASTERN PIPE LINE COMPANY,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

MOTION TO DISMISS

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INDEX TO BRIEF

MOTION TO DISMISS 1
OPINION BELOW 2
JURISDICTION 2
QUESTIONS PRESENTED 2
STATEMENT 2
ARGUMENT 6
The Judgment of the Kansas Supreme Court Rests Upon an Adequate Nonfederal Ground, and No Federal Question Was Properly Raised 6
The State Corporation Commission of the State of Kansas, Not Private Pipe Line Companies, Should Determine the Amount of Natural Gas Which May Be Produced from the Kansas Hugoton Gas Field 7
CONCLUSION 12

Index of Appendices

Appendix

A Order of Consolidation, District Court of Stevens County, Kansas February 13, 1960 ..... A1

B Order for Consolidation and Directing Parties to Proceed in the District Court of Stevens County, Kansas, February 6, 1960 ..... A3

C Motion to Quash Filed by Kansas-Nebraska Natural Gas Company, Inc., in the District Court of Stevens County, Kansas, on February 12, 1960 A5

D Notice of Appeal and Specification of Errors Filed by Kansas-Nebraska Natural Gas Company, Inc., in the District Court of Stevens County, Kansas A7

Table of Cases and Statutes

Bandini Petroleum Co. v. *California Superior Ct.*, 284 U.S. 8 (1931) 10
Black v. *Cutter Laboratories*, 351 U.S. 292 (1956) 6
Cramp v. *Board of Public Instruction of Orange County, Florida*, 368 U.S. 278 (1961) 6
Fox Film Corp. v. *Muller*, 296 U.S. 207 (1935) 6
Holley v. *Lawrence*, 317 U.S. 518 (1943) 6
Stembridge v. *State of Georgia*, 343 U.S. 541 (1952) 6
Natural Gas Act, 15 U.S.C., §717(b) 8

IN THE

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OCTOBER TERM, 1964

No. 140

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., a Corporation,
Appellant,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION, AND PANHANDLE EASTERN PIPE LINE COMPANY,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

MOTION TO DISMISS

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, Panhandle Eastern Pipe Line Company, appellee, moves to dismiss this appeal from the judgment of the Supreme Court of the State of Kansas on the grounds that such judgment rests on adequate nonfederal bases, that the alleged federal question was not properly raised and that no substantial federal question is presented.

OPINION BELOW

The opinion of the Supreme Court of the State of Kansas is reported at 192 Kan. 29, 386 P.2d 288 (Jurisdictional Statement A1).

JURISDICTION

Appellant attempts to invoke the jurisdiction of the Supreme Court of the United States under 28 U.S.C., § 1257 (2).

QUESTIONS PRESENTED

Whether the judgment of the Supreme Court of the State of Kansas rests on an adequate nonfederal ground, whether any federal question is properly raised and whether the State Corporation Commission of the State of Kansas or private pipe line companies shall fix the amount of natural gas to be produced from the Kansas Hugoton gas field.

STATEMENT

This case concerns orders entered by the State Corporation Commission of the State of Kansas.[1] In 1956, the Kansas Commission began hearings to reconsider the method by which it calculated the amount of natural gas to be produced from wells located in that part of the

1. Cases related to this proceeding and on appeal to this Court are No. 75, *Colorado Interstate Gas Company* v. *The State Corporation Commission of the State of Kansas et al.*, and No. 83, *Northern Natural Gas Co. et al.* v. *State Corp. Commission of the State of Kansas et al.*

Hugoton gas field situated in the State of Kansas. Prior to that time, the Kansas Commission had, after hearings and in the manner described below, fixed the amount of gas to be produced from the Kansas Hugoton field on the basis of monthly estimates submitted by the pipe line companies purchasing gas from that field. Each month the Kansas Commission accepted without question the pipe line companies' estimates, adding to the total estimates the amount of gas, if any, taken in the prior month in excess of the amount fixed by the Commission for that month and subtracting the amount, if any, which under the Commission's order for the prior month any company or companies could have taken but failed to take. Thus, the amounts of gas actually taken by the companies controlled the Kansas Commission's determinations (Jurisdictional Statement A25-A26, A46-A47). The Kansas Supreme Court held that the practice of subtracting amounts of gas not taken was unauthorized under both the applicable Kansas Statute and the Kansas Commission's own orders (*id.* at A46).

Beginning in May, 1956, the Kansas Commission employed several variations in its procedure, finally adopting a method based largely upon the total of the pipe line companies' estimates. The most significant change in the Kansas Commission's procedure was that the amount of gas not taken under the prior month's determination was no longer subtracted from the amount determined by the Commission to be necessary to satisfy the market demand for gas for the current month (*id.* at A26-A27). This has made available to the pipe line companies additional quantities of gas, and the appellant contends that this is unlawful.

Two types of orders issued by the Kansas Commission are involved in this appeal: (1) monthly orders for

each month from October, 1959, through March, 1960, fixing the amount of gas available to be produced in each of those months, and (2) a semiannual order determining the market demand for gas from the Kansas Hugoton field for the foregoing six months' period.

1. **Proceedings Arising in the District Court of Finney County, Kansas.**

Appellant petitioned the District Court of Finney County, Kansas, for judicial review of the Kansas Commission's orders. In each instance this appellee, Panhandle Eastern Pipe Line Company ("Panhandle"), and the appellee Southwest Kansas Royalty Owners Association ("Royalty Owners") intervened.

The Finney County District Court entered judgment affirming the Kansas Commission's semiannual market demand order for October, 1959, through March, 1960, and affirming the orders for each month during that period insofar as they permitted production of gas in excess of that which would have been permitted under the Commission's previous practice consolidated with other similar appeals, all such appeals being docketed by the Kansas Supreme Court as Cases 42,175, 42,176, 42,185 and 42,230 (Consolidated). These cases were disposed of by the Kansas Supreme Court on the nonfederal ground that exclusive jurisdiction to review the Commission's October, 1959, through March, 1960, orders was vested in the Stevens County District Court, petitions for judicial review having been filed there earlier than in the Finney County District Court.

2. **Proceedings Arising in the District Court of Stevens County, Kansas.**

The Royalty Owners and Panhandle petitioned the Stevens County District Court for judicial review of the

Kansas Commission's orders described in the preceding paragraph. All such petitions were consolidated, and in accordance with accepted practice, the Stevens County District Court set the consolidated petitions for trial on February 13, 1960 (Appendix A). By court order dated February 6, 1960, appellant was directed to proceed in the Stevens County District Court, presenting to it the appellant's grievances respecting the Kansas Commission's orders (Appendix B). The appellant refused to comply. Instead, it appeared specially, questioning the Court's jurisdiction, and moved to quash the order entered February 6, 1960 (Appendix C).

Trial of the petitions was held as scheduled on February 13, 1960 (Jurisdictional Statement A61-A63). Appellant neither appeared nor participated in the trial, and there was no request for continuance. On March 10, 1960, the Stevens County District Court entered judgment, affirming the Kansas Commission's orders (*Ibid.*). Neither the Notice of Appeal from that judgment nor appellant's Specification of Errors raises any federal question (Appendix D).

At no time did the appellant intervene in the judicial review proceedings before the Stevens County District Court; to the contrary, it refused to submit to that court's jurisdiction, which the Kansas Supreme Court held was exclusive. Moreover, the appellant failed to preserve any federal question in connection with its attempted appeal from the judgment of the Stevens County District Court.

In summary, in proceedings before the Kansas Supreme Court, review of which is sought here, appellant was a party to Cases 42,175, 42,176, 42,185 and 42,230 (Consolidated) but not to Case 42,038. The judgment of the Kansas Supreme Court in the Consolidated Cases is

based upon a nonfederal ground adequate in itself to sustain the disposition made by that court. While the appellant attempted to appeal in the case to which it was not a party (No. 42,038), it failed to raise any federal question.

ARGUMENT

The Judgment of the Kansas Supreme Court Rests Upon an Adequate Nonfederal Ground, and No Federal Question Was Properly Raised

This Court has repeatedly held that it lacks jurisdiction to review a state court's decision based upon an independent state ground sufficient to support its judgment. A case such as this, as this Court has previously stated, "is controlled by the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, our jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935). Decisions acknowledging this rule, in addition to those cited in the *Muller* case, include:

Cramp v. *Board of Public Instruction of Orange County, Florida*, 368 U.S. 278, 281 (1961).

Black v. *Cutter Laboratories*, 351 U.S. 292 (1956).

Stembridge v. *State of Georgia*, 343 U.S. 541 (1952).

Holley v. *Lawrence*, 317 U.S. 518 (1943).

Appellant requests this Court to review a judgment entered by the Kansas Supreme Court in five cases (Cases 42,175, 42,176, 42,185 and 42,230 (Consolidated) and

42,038). Appellant was not a party to Kansas Supreme Court Case 42,038 and, accordingly, can raise no issue in this Court respecting that proceeding. (No federal questions were raised by appellant in the appeal which it did attempt.) Appellant was a party to Kansas Supreme Court Cases 42,175, 42,176, 42,185 and 42,230 (Consolidated), but those proceedings were decided by the Kansas Supreme Court on the unmistakably nonfederal ground that the trial court (District Court of Finney County, Kansas) lacked jurisdiction to review the Kansas Commission's orders covered by such Consolidated Cases because petitions for judicial review of such orders were filed first in the District Court of Stevens County, Kansas.

The State Corporation Commission of the State of Kansas, Not Private Pipe Line Companies, Should Determine the Amount of Natural Gas Which May Be Produced from the Kansas Hugoton Gas Field

The merits of this appeal present only the nonfederal question of whether a majority of the pipe line companies or the Kansas Commission may control the amount of gas which lawfully may be produced from the Kansas Hugoton gas field. Procedural deficiencies previously discussed are dispositive of this appeal. Nevertheless, to dispel any impression that the appellant may be deprived of the opportunity to assert a meritorious case only because of procedural deficiencies, we desire to focus attention upon the issue on the merits and rescue it from the distortion to which it has been subjected by the appellant in its attempt to convert a purely local question into a federal-state conflict.

The litigation in its entirety involves the validity of producing allowables, *i.e.*, the amount of gas which indi-

vidual wells are permitted to produce in a given period of time. It would be difficult to conceive of something more squarely within the function of production, which, under the "production and gathering" exclusion of the Natural Gas Act, is reserved for regulation by the states (15 U.S.C., § 717(b), Jurisdictional Statement 8).

Apart from this rather obvious disposition of appellant's basic contention that the jurisdiction of the Federal Power Commission has been invaded, we call attention to the fact that the true issue raised by appellant is not whether the Kansas Commission or the Federal Power Commission is the agency empowered to set gas well allowables, but whether the Kansas Commission or the pipe line companies should have actual control of the allowables.

In this case, the Kansas Commission's orders specifying the amount of gas that may be taken did not please all producers in the field. The Commission sometimes accepted the nominations as the market demand and sometimes increased them in inconsequential amounts, but no longer deducted underages or added overages for the previous month.

There were three sides to this litigation in the state court. The appellant attacked the Kansas Commission's orders, contending that the Commission was required to deduct underages from, and add overages to, the amount required to satisfy market demand.[2] This has been characterized as the historic method of computing allowables.

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2. Underages are amounts of gas which could have been produced under prior orders of the Commission, but were not taken by the pipe line companies. Overages are amounts of gas which the pipe line companies have taken in excess of quantities authorized by prior orders of the Commission.

If this was done, the market demand determination had no ultimate effect on allowables because past runs controlled current allowables. Panhandle and the Royalty Owners attacked the orders on the grounds that the actual market demand, as shown by the evidence, vastly exceeded the nominations (estimates of amounts of gas to be purchased) filed by the pipe line companies and that the Commission had no right to let a majority in interest of the pipe line companies determine allowables, either by actual purchases (as was the case if underages were subtracted and overages added each month) or by nominations. The Commission defended its orders but objected to having to defend the same order in more than one court.

Both trial courts, the Finney County District Court, which lacked jurisdiction, and the Stevens County District Court, which had jurisdiction, concluded that the Kansas Commission was not authorized or required to follow the historic method of deducting underages and adding overages. Both courts rejected Panhandle's and the Royalty Owners' contentions that the evidence required a market demand determination substantially in excess of the nominations.

Apart from its conclusions on the procedural questions previously discussed, the Kansas Supreme Court held: (1) The Commission was neither authorized nor required to follow the historic method of deducting underages; (2) Market demand is a question of fact to be determined by the Commission from all of the available evidence, and, although the Commission's market demand determination barely exceeded the total of the nominations, Panhandle and the Royalty Owners had failed to establish that the determination was arbitrary or unreasonable. This second holding is not before this Court because Panhandle and the Royalty Owners have not ap-

pealed. Panhandle's decision in this respect is the product of a practical realization that it is more important that the litigation be terminated than that the allowables for seven years be recalculated on the basis of the full market demand. The first holding is all that is left in the case. Certainly, the question of whether the Kansas Statute directs or permits the Kansas Commission to deduct underages is a question of Kansas law.

The appellant has been candid enough to acknowledge that "At this point in time, the power of the State of Kansas to regulate by limiting the production of natural gas from common sources of supply within the state in order to prevent waste of a valuable resource and to protect the correlative rights of owners of interests in such production is no longer questioned. (*Bandini Petroleum Co.* v. *California Superior Ct.*, (1931) 284 U.S. 8, 76 L. Ed. 136, 52 S. Ct. 103)." (Jurisdictional Statement 26).

In none of the related appeals (Nos. 75, 83 and 140) do the appellants complain of the setting of allowables by the Kansas Commission—providing that the Commission establishes allowables according to the so-called historic method. In fact, this is the totality of the complaint, that the Commission departed from the historic method. Reduced to fundamentals, this method was a procedure whereby the Kansas Commission was limited to performing the mechanical function of a calculating machine, using data furnished by the pipe line companies. Thus the pipe line companies—not the Kansas Commission—controlled allowables by (1) their estimates and (2) the quantities of gas actually taken.

Although in some cases the market demand determined by the Commission after it abandoned the historic method was in excess of the estimates, this was not burdensome to the appellant. Allowables do not compel the

taking of any gas, rather they are permissive and authorize equitable production from each well in a common source of supply.

Appellant complains that it must choose between two alternatives, both of which are detrimental. It may either expand its facilities to accommodate the quantities of gas made available under the Kansas Commission's orders, or suffer cancellation of underages. The fact is that the appellant has not been hurt by the allowables approved by the Kansas Supreme Court. All underages cancelled during times pertinent to this appeal have been or, upon application by the party concerned, will be reinstated, and the Kansas Commission has placed a moratorium upon cancellation of further underages.[3] Moreover, the appellant carefully avoids any representation that its facilities will be unable to accommodate increased quantities of gas, stating instead that "its gathering, processing, compressing and transmission facilities in the Kansas Hugoton Field were operated at near capacity." (Jurisdictional Statement 23). Accordingly, the Kansas Commission's orders will have no adverse effect.

Further, as expressly observed by the Kansas Supreme Court (Jurisdictional Statement A48), the Kansas Commission's prior practice of adding canceled underages to the market demand for gas was not questioned in the Kansas courts. Until added to the market demand, gas constituting the canceled underage simply remains in the ground. Under the existing practice, no one is deprived of anything. It follows that review of the Kansas Commission's orders by this Court would be inappropriate until the only practice which could conceivably

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3. No. 83, *Northern Natural Gas Company et al. v. State Corporation Commission of the State of Kansas*, Jurisdictional Statement 29, n. 33.

produce injury has been put into effect and has been properly challenged in the Kansas courts.

Though the appellant has tortured the issue in an attempt to make it fit the form of a federal question, the case stripped bare is nothing more than a question of whether a majority of the pipe line companies may control allowables to suit their private purposes or whether the Kansas Commission may set allowables based upon reasonable evidence. Surely this issue, premised upon appellant's contentions that a state court cannot hear evidence of facts which exist outside of its territorial jurisdiction and that, in the future, other states might take some adverse action, presents no substantial question, federal or otherwise.

CONCLUSION

Panhandle Eastern Pipe Line Company, appellee, submits that this appeal should be dismissed because the judgment of the Kansas Supreme Court rests on adequate nonfederal grounds, because no federal question was properly raised and because no substantial federal question is presented.

Respectfully submitted,

WENDELL J. DOGGETT
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CHAS. VANCE
C. C. LINLEY
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Of Counsel

August, 1964

APPENDIX A

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC

v.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS

DISTRICT COURT OF STEVENS COUNTY, KANSAS

Southwest Kansas Royalty Owners' Association, Petitioner, vs. State Corporation Commission of Kansas, Respondent.	Case No. 4104 4105 4110 4117

Order of Consolidation

Now on this 13th day of February, 1960, this action comes on for trial on the merits pursuant to setting of this case made on the call of the docket on the first day of the January term. Southwest Kansas Royalty Owners' Assn. appears by its attorneys, Dale M. Stucky, Robert Cornwell and A. E. Kramer; the Kansas Corporation Commission appears by J. Robert Wilson and John Townsend, its attorneys, and Panhandle Eastern Pipe Line Co. appears by C. C. Linley and Chas. Vance, its attorneys.

Upon oral motion of Panhandle Eastern Pipe Line Company made in open court, and upon argument of counsel, the court finds that cases 4104, 4109 and 4117, and all of the cases heretofore consolidated with them, should be consolidated with Case No. 4105, the market

demand case, for the purpose of trial, judgment and further proceedings.

It is by the Court so ordered.

L. L. Morgan,
District Judge.

Approved:

C. C. Linley,
Chas. Vance,
By: C. C. Linley,
Attorneys for Panhandle Eastern Pipe Line Company.

J. Robert Wilson,
John Townsend,
By: John D. Townsend,
Attorneys for Kansas Corporation Commission

Dale M. Stucky,
Robert Cornwell,
A. E. Kramer,
By: Dale M. Stucky,
Attorneys for Southwest Kansas Royalty Owners' Association.

Filed: 2-24-60. John F. Fulkerson, Clerk of the Dist. Court.

APPENDIX B

DISTRICT COURT OF STEVENS COUNTY, KANSAS

The Southwest Kansas Royalty Owners Association, Petitioner, vs. The State Corporation Commission of the State of Kansas, Respondent.	Case No. 4105

Order for Consolidation and Additional Parties

Now, on this 6th day of February, 1960, comes on for hearing the motion of Panhandle Eastern Pipe Line Company to Consolidate and Join Additional Parties. Panhandle Eastern Pipe Line Company appears by Jeff A. Robertson, C. A. Conoley, C. C. Linley and Chas. Vance, its attorneys. Southwest Kansas Royalty Owners' Association appears by Dale M. Stucky, Robert Cornwell, and Kramer and Nordling, its attorneys. No other appearances are made.

Evidence is heard; the motion is argued and submitted to the Court.

The Court, being fully advised, finds that this case and Case No. 4107, were filed in this Court by separate plaintiffs both seeking judicial review of the same order of the Kansas Corporation Commission; that petitions also seeking to review the same order were subsequently filed in the District Court of Finney County by Colorado Interstate Gas Company, Northern Natural Gas Company, Cities Service Gas Company and Kansas-Nebraska Gas Company;

The said Commission Order is not subject to piece meal review from case to case and Court to Court; all parties who claim to be aggrieved by said order and who have appealed the same or subsequent monthly proration orders and reports of the Commission based thereon are necessary and indispensable parties to, and will have substantial rights affected by the decision in this case.

The Petition for review of the Commission's market demand determination for the 6 month proration period beginning October 1, 1959 and ending March 31, 1960, was filed in this Court before the petition attacking the same order was filed in any other case in either court; that the Commission's allowable orders for the months of October, November and December, 1959, were each based on the Commission's 6 month market demand determination aforesaid; that the jurisdiction of this Court, as to all four Commission orders, became exclusive upon the prior filing of the market demand controversy herein: that all parties claiming to be aggrieved by said orders should be required to and must present their grievances in a single proceeding.

It Is Therefore by the Court Ordered: That Case No. 4107 in this Court, wherein Panhandle Eastern Pipe Line Company is plaintiff, be, and hereby is consolidated with this case for trial and judgment.

It is further ordered that Northern Natural Gas Company, Colorado Interstate Gas Company, Cities Service Gas Company, and Kansas-Nebraska Gas Company be, and they hereby are directed to file in this Court such counter-abstracts of the record and other pleading as they may deem appropriate, on or before February 13, 1960, and to present to this Court and proceed in this Court only for determination of their grievances with the said Order.

It is further ordered that this order be effective as to each of said parties upon actual notice or knowledge of the entry thereof.

L. L. Morgan,
Judge.

Approved:

Panhandle Eastern Pipe Line Company,
By Chas. Vance,
C. C. Linley,
Southwest Kansas Royalty Owners' Association,
By Dale M. Stucky.

A true copy.

/s/ John F. Fulkerson,
(Seal) Clerk of the District Court of
Stevens County, Kansas.

APPENDIX C

Kansas-Nebraska's Motion to Quash

(Filed February 12, 1960.)

(Caption and Signatures Omitted.)

Comes now Kansas-Nebraska Natural Gas Company, Inc., a Kansas corporation, and appears specially for the purpose only of questioning the jurisdiction of this Court by this motion and for no other purpose, and moves the Court to quash its order entered herein on the 6th day of February, 1960. The Order directed the joining of Kansas-Nebraska Natural Gas Company, Inc., as a party to this action, and further ordered Kansas-Nebraska Natural Gas Company, Inc., to file in this Court such counter abstracts and other pleadings as it deems appropriate and

to proceed only in this Court for judicial review of the order of the Kansas Corporation Commission determining market demand for the six months proration period beginning October 1, 1959, and ending March 31, 1960, and of the Commission's allowable orders for the months of October, November and December, 1959, respectively. The said Order should be quashed for the following reasons:

1. This Court does not have jurisdiction or authority to order Kansas-Nebraska Natural Gas Company, Inc., to dismiss the petition for judicial review it has filed in the District Court of Finney County, Kansas, or to otherwise abandon its cause in that Court, or to require Kansas-Nebraska Natural Gas Company, Inc., to file its appeal in and to proceed only in this Court.

2. The provisions of the statute, G.S. 1949, 55-606, do not require that all proceedings for judicial review of an order of the State Corporation Commission, though instituted by different parties in different courts, be consolidated in one proceeding; nor does the statute provide or require that all interested parties must seek redress of such orders by being joined in the proceeding first instituted or by filing their petitions in the District Court where some other party has filed its petition seeking a review of said order.

3. This Court has been granted no authority under the applicable statutes and it has no inherent power to order consolidation of Review proceedings lawfully filed in different District Courts pursuant to G.S. 1949, 55-606, and the pretended Order for Consolidation and Additional Parties entered in this Court on February 6, 1960, is void as to this specially appearing party, Kansas-Nebraska Natural Gas Company, Inc.

Therefore, this Court, in the above numbered proceeding, is without jurisdiction of Kansas-Nebraska Natural Gas

Company or of the subject matter of said corporations' Petition for Judicial Review now on file in the District Court of Finney County, Kansas.

APPENDIX D

Notice of Appeal

Kansas-Nebraska Natural Gas Company

(Filed May 9, 1960.)

(Caption and Signatures Omitted.)

NOTICE OF APPEAL TO THE SUPREME COURT

To: Southwest Kansas Royalty Owners' Association, The State Corporation Commission of the State of Kansas, Panhandle Eastern Pipe Line Company, and all other parties, if any, adversely affected by this appeal, together with their respective attorneys of record.

Take Notice that the undersigned, Kansas-Nebraska Natural Gas Company, Inc., does hereby appeal to the Supreme Court of Kansas from the judgment rendered, entered and made by the Court on the 10th of March, 1960, in the above-entitled action and those actions consolidated therewith and therein whereby said Court, among other things, sustained as valid and confirmed the Report and Order of the State Corporation Commission of the State of Kansas dated November 10, 1959, and subsequent Allowable Orders of said Commission based thereon and made in connection therewith involved therein the Order made and entered on February 6, 1960, as modified by the Order of the Court made on March 10, 1960, whereby Kansas-Nebraska Natural Gas Company, Inc., was ordered and directed to proceed in said Court only for determination of their grievances with the Commission order of Novem-

ber 10, 1959, and subsequent Allowable Orders of said Commission based thereon and made in connection therewith and the action and procedure of the Court therein in denying or failure to rule upon, as the case may be the special appearance motions duly filed by Kansas-Nebraska Natural Gas Company, Inc., to quash, set aside and hold for naught the Order made and entered by the Court therein February 6, 1960, the notice and process upon which the same purports to be based, whereby Kansas-Nebraska Natural Gas Company, Inc., was made a party to the above captioned case and those consolidated therewith, together with all other orders, rulings, directions and procedures entered therein insofar as the same or any of them apply to Kansas-Nebraska Natural Gas Company, Inc., and purport to subject its person, its property or the subject matter of its Judicial Review action or actions pending in the District Court of Finney County, Kansas, to the jurisdiction of the above named Court in the above entitled action or those actions consolidated therewith. (Affidavit of Service appears in Abstract and Counter Abstract of Southwest Kansas Royalty Owners Association on pages 334 to 336.)

SPECIFICATION OF ERRORS

1. The District Court erred in entering its order on February 6, 1960, directing Kansas-Nebraska Natural Gas Company to proceed in the District Court of Stevens County and in that court only to secure relief from the Commission orders which are involved in this appeal.

2. The District Court erred in failing to rule upon or denying, as the case may be, the special appearance Motion To Quash filed in said court on February 12, 1960.

3. The District Court erred in proceeding to hear, consider and determine the merits of the review proceedings filed in said court without first seeking a determina-

tion of its authority to do so in view of the proceedings then pending to review the same Commission orders in the District Court of Finney County, Kansas.

4. The District Court erred in finding that the Report And Order dated November 10, 1959, and the October, November and December, 1959 Allowable Orders are based on substantial competent evidence.

5. The District Court erred in finding that the Report And Order dated November 10, 1959, and the October, November and December, 1959 Allowable Orders are lawful and valid.

6. The District Court erred in finding that inequities exist discriminating in favor of the correlative of producers and royalty owners in the Oklahoma Hugoton Gas Field and against those in the Kansas Hugoton Gas Field and that the Report And Order properly makes orderly provisions for correcting such "inequities."

7. The District Court erred in concluding that the Report And Order in attempting to deal with the rights of producers and royalty owners in the Kansas Hugoton Field in relationship to the rights of producers and royalty owners in the Oklahoma Hugoton Field and to balance the rights of the said producers and royalty owners in the Kansas and Oklahoma portions of the field was a valid exercise of authority conferred upon the Commission by G.S. 1959, Supp. 55-703.

8. The District Court erred in failing to consider on its own motion and to rule upon the constitutionality of G.S. 1959, Supp. 55-703, in view of the nature of the proceedings and the rights of parties whose views were not heard and considered.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

Office-Supreme Court, U.S.
FILED
AUG 10 1964
JOHN F. DAVIS, CLERK

No. 140

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., a Corporation,
Appellant,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION AND PANHANDLE EASTERN PIPE LINE COMPANY,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

JOINT MOTION TO DISMISS OF THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS

and

SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION

*E. EDWARD JOHNSON, *General Counsel for State Corporation Commission of Kansas,*
Topeka, Kansas,
RICHARD C. BYRD, *Special Counsel for State Corporation Commission of Kansas,*
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INDEX

Opinion Below 2

Jurisdiction 2

Questions Presented 2

Statement of the Case 2

Argument—

I. The Judgment of the Kansas Supreme Court Dismissing Appellant's Appeal in the Consolidated Cases Because the Trial Court Lacked Jurisdiction Is an Adequate Nonfederal Basis for Such Judgment and Precludes Review by This Court 5

II. There Are Not Any Federal Questions Involved in This Appeal Because Appellant Did Not Timely and Properly Raise Such Questions in the Lower Courts 6

III. These Prorations Orders Do Not Violate the Federal Constitution or the Natural Gas Act 7

Conclusion 12

Cases and Authorities Cited

Buck v. *California*, 343 U.S. 99 5

Cities Service Gas Company v. *Peerless Oil & Gas Co.*, 340 U.S. 179 9

Edelman v. *California*, 344 U.S. 357 7

Fay v. *Noia*, 372 U.S. 391, 428 5

Federal Power Commission v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 10-11

Jeffers v. *Jeffers*, 181 Kan. 595, 313 P.2d 233 6

Karle v. *Board of County Commissioners*, 188 Kan. 800, 366 P.2d 241 6

Nickel v. *Cole*, 256 U.S. 222 5

Northern Natural Gas Company v. *State Corporation Commission*, 372 U.S. 84 11

Puget Sound Power & L. Co. v. *King County*, 264 U.S. 22 6-7

Reserve Oil and Gas Co. et al., Docket Nos. G 4720, issued April 2, 1964 10

State v. *Scott*, 156 Kan. 11, 131 P.2d 664 6

---

15 U.S.C., §717 3

15 U.S.C., §717b 11-12

28 U.S.C., §1257(2) 2

G.S. Kan., 55-606 ..... 3, 5

H.R. Rep. No. 709, 75th Cong., 1st Sess., p. 2 11

Murphy, *Conservation of Oil & Gas, a Legal History*, 1948 11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 140

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC. a Corporation,
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vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION AND PANHANDLE EASTERN PIPE LINE COMPANY,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

MOTION TO DISMISS

Pursuant to Revised Rule 16 of this Court, Appellees State Corporation Commission of the State of Kansas[1] and Southwest Kansas Royalty Owners Association[2] move to

1. Hereinafter called Commission.
2. Hereinafter called Landowners.

dismiss this appeal because the judgment of the Kansas Supreme Court rests on adequate nonfederal bases, the federal questions sought to be reviewed were not timely or properly raised and no substantial federal question is presented.

OPINION BELOW

The Opinion of the Kansas Supreme Court is reported at 192 Kan. 29, 386 P.2d 288.[3]

JURISDICTION

Appellant attempts to invoke the jurisdiction of this Court under 28 U.S.C. §1257(2).

QUESTIONS PRESENTED

Whether the judgment of the Kansas Supreme Court rests on adequate nonfederal grounds, whether the federal questions sought to be reviewed were timely and properly raised and whether any substantial federal question is presented

STATEMENT OF THE CASE

This appeal involves gas proration orders issued by the Commission for the Kansas Hugoton Field. The proration orders are addressed and directed solely to producers—not purchasers—and fix the maximum amount of gas that can be produced from each well. They are permissive orders and do not require any producer to produce any gas.

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3. Reproduced in Appendix A to Jurisdictional Statement

Appellant has appealed from Kansas Supreme Court Cases Nos. 42,175, 42,176, 42,185 and 42,230 (Consolidated by the Kansas Supreme Court)[4] and 42,038, each of which involved separate proceedings in the District Courts of Finney and Stevens Counties, Kansas. It will be necessary to outline the various proceedings in each District Court and the various judgments of each District Court involved in the various appeals to the Kansas Supreme Court.

A. Consolidated Cases.

These cases were initiated by Appellant and others in the Finney County Court to review various proration orders. The Trial Court rejected Appellant's contentions based on federal questions and entered judgment accordingly (192 Kan. 29, 386 P.2d 288; Appendix A to Jurisdictional Statement).

Appellant appealed such judgment to the Kansas Supreme Court. Appellant totally abandoned such federal questions and relied exclusively on non-federal questions in the Supreme Court of Kansas[5] (Nos. 42,175, 42,176, 42,185 and 42,230, Abstract of the Record of Appellants Northern Natural Gas Company *et al.*, 292-3).

Appellant's appeal was dismissed by the Kansas Supreme Court on the nonfederal ground that, under the Kansas Judicial Review Act,[6] the "District Court of Finney

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4. Hereinafter called consolidated cases.

5. Appellant's brief and reply brief only discuss nonfederal questions.

Appellant's requested conclusions of law do not even mention the Natural Gas Act (15 U.S.C. §717) or the Federal Constitution (Nos. 42,175, 42,176, 42,185, 42,230 and 42,038, Findings of Fact and Conclusions of Law Requested by Appellant Kansas-Nebraska Natural Gas Company, Inc., 10-4).

6. G.S. Kan., 55-606.

County was without jurisdiction" (192 Kan. at 35, 386 P.2d at 292; Appendix A to Jurisdictional Statement).

B. Case No. 42,038.

The Landowners initiated this case in the Stevens County Court to review the same proration orders involved in the consolidated cases. Prior to trial, the Stevens County Court was informed that Appellant had, after the commencement of the Stevens County proceedings, filed petitions to review the same proration orders in the Finney County Court. The Stevens County Court ordered Appellant to present its grievances concerning such proration orders to the Stevens County Court (No. 42,038, Abstract and Counter Abstract of Southwest Kansas Royalty Owners Association, 230-6, 239-43).

Appellant refused to follow the Court's order. The day before trial it filed a motion reciting that it appeared specially to challenge the Court's jurisdiction solely on nonfederal grounds. Appellant never presented this motion to the Court for determination. It did not appear or participate in the Stevens County proceedings. After that Court entered judgment, Appellant appealed to the Kansas Supreme Court (*Supra* at 241-2, 244-5, 333-6).

Appellant did not include any federal questions in its specification of errors to the Kansas Supreme Court. In that Court, Appellant relied solely on alleged errors based on state questions and failed to urge any federal questions.[7] The Kansas Supreme Court rejected Appellant's nonfederal specification of errors and affirmed the judgment of the Stevens County Court (No. 42,038, Abstract of Appellant Kansas-Nebraska Gas Company, Inc., 57-90; 192 Kan. 29, 386 P.2d 288; Appendix A to Jurisdictional Statement).

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7. Authorities cited note 5, *supra*.

ARGUMENT

I. The Judgment of the Kansas Supreme Court Dismissing Appellant's Appeal in the Consolidated Cases Because the Trial Court Lacked Jurisdiction Is an Adequate Nonfederal Basis for Such Judgment and Precludes Review by This Court.

The Kansas Supreme Court held that the Stevens County Court had exclusive jurisdiction to review these proration orders and dismissed Appellant's appeal in the consolidated cases on the purely nonfederal ground that the Finney County Court did not have jurisdiction under the Kansas Judicial Review Act.[8]

This Court does not review state court judgments based on adequate nonfederal grounds:

> "this Court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the copresence of federal grounds [Citations omitted]" *Fay* v. *Noia*, 372 U.S. 391, 428.

Other cases recognizing this rule are *Buck* v. *California*, 343 U.S. 99; *Nickel* v. *Cole*, 256 U.S. 222; and cases cited therein.

The judgment of the Kansas Supreme Court rests on an adequate nonfederal basis and is not subject to review by this Court.

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8. G.S. Kan., 55-606.

II. There Are No Federal Questions Involved in This Appeal Because Appellant Did Not Timely and Properly Raise Such Questions in the Lower Courts.

Appellant did not timely and properly raise any federal questions in the lower courts. Consequently, no federal questions are properly presented to this Court.

In Case No. 42,038, Appellant did not appear in the Trial Court and obviously did not raise the federal questions.[9] It did not include federal questions in its specification of errors to the Kansas Supreme Court[10] and never raised federal questions in that Court.[11]

In the consolidated cases, Appellant abandoned federal questions in its brief to the Kansas Supreme Court.[12] It did not raise any federal questions in its requested conclusions of law.[13]

This Court does not consider federal questions that were not presented to the lower court.

In *Puget Sound Power & L. Co.* v. *King County*, 264 U.S. 22, this Court held that:

"No evidence appears in the record that it raised an objection based on the 14th Amendment to the Federal

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9. The Kansas Supreme Court does not consider questions that were not presented to trial court (*Karle* v. *Board of County Commissioners*, 188 Kan. 800, 366 P.2d 241).

10. The Kansas Supreme Court does not consider questions that are not included in Appellant's specification of errors (*Jeffers* v. *Jeffers*, 181 Kan. 595, 313 P.2d 233).

11. Authorities cited note 5, *supra*.

12. Specifications of errors that are not discussed in the brief are deemed abandoned and are not considered by the Kansas Supreme Court (*State* v. *Scott*, 156 Kan. 11, 131 P.2d 664).

13. Authorities cited note 5, *supra*.

> Constitution or any other Federal question in the superior court or supreme court. It is too late . . . to raise it in the assignment of errors in this court, even though it joins in the assignment with the street railway company, which did raise such an objection in all the courts" 264 U.S. at 25.

In *Edelman* v. *California*, 344 U.S. 357, this Court refused to review federal questions that had not been raised in the state court in the manner required by state law:

> "It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of State law. [Citations omitted] Noncompliance with such local law can thus be an adequate state ground for a decision below." 344 U.S. at 358.

Appellant refused to raise any federal questions in the lower court.[14] It cannot resurrect them in this Court.

III. These Proration Orders Do Not Violate the Federal Constitution or the Natural Gas Act.

The above discussion demonstrates that no federal questions are properly presented and these appeals should be disposed of accordingly. However, due to the fact that imaginative counsel, aided in no small part by a voluminous record, has distorted this appeal to the point that the Commission has been accused of engaging in some sort of unlawful scheme, we feel compelled to briefly mention the merits of this appeal.

Appellant concedes that a state can prorate gas when necessary to prevent waste or protect correlative rights.

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14. It is interesting to note that Appellant's assertion that the federal questions it now wants to raise were "urged upon the Kansas Supreme Court" (Jurisdictional Statement, 5) is not supported by any citations to the record.

It contends however, that the proration orders involved in these proceedings were not made for the purpose of preventing waste or protecting correlative rights and therefore, they violate the Federal Law.

The record before the Kansas Commission contains extensive expert testimony on the technical phase of waste prevention and protecting correlative rights. The record is conclusive that the proration orders involved in these proceedings were necessary and designed to prevent physical waste of natural gas and to protect the correlative rights of the landowners and leasees.

It was evident from this investigation that unless the gas from the Hugoton Field was produced at a rate in excess of the rate it was then being produced 70% to 80% of the 4,000 wells in the field would ultimately fail due to pipe corrosion. The corrosion of pipe would permit otherwise recoverable gas to be lost. Pipe corrosion permitted the encroachment of water into the producing formation causing permanent damage to the reservoir. Wells that failed due to corrosion would ultimately have to be replaced with expensive new wells or the gas would be lost.[15]

The instances of pipe failure due to corrosion greatly increased with the age of the wells. To reduce pipe failures and the resulting loss of gas the field had to be produced at a more reasonable and realistic rate. The evidence clearly showed that the slow rate of production and the resulting loss of gas due to pipe corrosion resulted from the methods followed by the Kansas Commission in determining the market demand for the field and in calculating the

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15. Nos. 41,515 and 41,516, Abstract of the Record, 71, 77-8, 84-6, 90, 92-3, 98, 272; Nos. 41,555 and 41,556, Appellant's Abstract of the Record, 24, 41; No. 42,038, Abstract and Counter Abstract of Southwest Kansas Royalty Owners Association, 78, 101.

allowables for the wells. If waste is caused by unwarranted limitation of production the correction of such a limitation is certainly a waste prevention measure.

Appellant's contention that these proration orders violate the Commerce Clause and the Fourteenth Amendment to the Federal Constitution were rejected by this Court in *Cities Service Gas Company* v. *Peerless Oil & Gas Co.*, 340 U.S. 179. There the Oklahoma Commission ordered an interstate purchaser to buy gas and fixed the price to be paid. Cities Service Gas Company made the same constitutional arguments that appellant now advances. This Court disposed of these contentions in short order.

In answering the Fourteenth Amendment argument, this Court held that:

> "[t]he Due Process and Equal Protection issues raised by Appellant are virtually without substance" 340 U.S. at 185.

The argument concerning the Commerce Clause did not fare much better:

> "It is now well settled that a state may regulate matters of local concern over which federal authority has not been exercised, even though the regulation has some impact on interstate commerce" 340 U.S. at 186.

Appellant concedes that the power of the state to issue proration orders "is no longer questioned",[16] but argues that, in some manner, when the Commission issued these orders it invaded the jurisdiction of the Federal Power Commission. While we have difficulty understanding this selfcontradictory argument, we do not think that Appellant seriously suggests that the overwhelmingly complicated

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16. Jurisdictional Statement, 26.

task of prorating gas for all states should be turned over to the Federal Power Commission.

The Federal Power Commission does not think that it has the power to issue proration orders. In *Reserve Oil and Gas Co., et al.*, Docket Nos. G-4720, *et al.*, issued April 2, 1964, the Federal Power Commission stated that:

> "[petitioner's] contentions in effect are that this Commission should perform the functions of prorating takes and adjusting correlative private rights of producers within a field; matters which it seems to us should be decided by the Commonwealth of Kentucky. . . ."[17]

This position is in accord with the decisions of this Court. In *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, this Court noted that:

> "The legislative history of this Act is replete with evidence of the care taken by Congress to keep the power over the production and gathering of gas within the states. This probably occurred because the state legislatures, in the interest of conservation, had delegated broad and elaborate power to their regulatory bodies over all aspects of producing gas" (Footnotes omitted). 337 U.S. at 509-13.

In the footnote to the above quotation, this Court said, "See, for example, Kansas Gen. Stat. C. 55 §§ 701713. . . ."[18]

This Court also made it clear that the states retained this power in *Northern Natural Gas Company* v. *State Corporation Commission*, 372 U.S. 84, when it stated that:

> "The State does not, however, appear to be without alternative means of checking waste and disproportionate or discriminatory taking" 372 U.S. at 94.

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17. Rehearing granted on other issues.

18. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 513, n. 17.

In the footnote to the above quotation, this Court noted that "the availability of regulatory alternatives, particularly in the form of proration and similar orders directed at producers, has been much discussed."[19]

Appellant apparently contends that the Federal Power Commission must be given the power to prorate gas because the Kansas proration orders will cause conflicts to arise among state proration agencies and with the Federal Power Commission.[20] Not only does this argument do violence to the very plain and well known Congressional intent that the states should retain power to prorate gas,[21] but it also overlooks the fact that the orders here under review were issued more than eight (8) years ago. There has been no conflict among the states or with the Federal Power Commission. There has been no interference with interstate sales or transportation of gas. Appellant's speculation as to possible conflicts is contrary to the facts.

The Congressional mandate that the states should retain control over the production of natural gas has been recognized by this Court on many occasions. The heart and soul of such regulation are proration orders. If, as Appellant suggests, the states do not have this power, there is no area whatsoever left for state regulation. To say the least, this would do violence to the very clear statement that

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19. *Northern Natural Gas Company* v. *State Corporation Commission*, 372 U.S. 84, 94, n. 12.

20. Jurisdictional Statement, 29-30.

21. Many states were prorating gas when the Natural Gas Act was passed (See, Murphy, Conservation of Oil & Gas, A Legal History, 1948) and, prior to passage, Congress was assured that the Act "takes no authority from State Commissions as it is so drawn as to complement and in no manner usurp State regulatory authority" (H.R. Rep. No. 709, 75th Cong., 1st Sess., p. 2).

the Natural Gas Act does not cover "the production . . . of natural gas" [22]

This appeal does not present any substantial federal question and should be dismissed.

CONCLUSION

The judgment of the Kansas Supreme Court rests on adequate nonfederal grounds. No federal questions were properly raised by the Appellant. The judgment of the Kansas Supreme Court does not involve a substantial federal question.

Appellees' motion should be granted and the appeals dismissed.

Respectfully submitted,

E. EDWARD JOHNSON, *General Counsel for State Corporation Commission of Kansas,*
Topeka, Kansas,
RICHARD C. BYRD, *Special Counsel for State Corporation Commission of Kansas,*
DALE M. STUCKY, *Counsel for Southwest Kansas Royalty Owners Association.*

Of Counsel:

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Wichita, Kansas.

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22. 15 U.S.C. §717b.

Office-Supreme Court, U.S.
FILED
SEP 2 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No. 140.

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., a Corporation,
Appellant,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

REPLY OF APPELLANT KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., IN OPPOSITION TO MOTIONS TO DISMISS

JAMES D. CONWAY,
ELMER J. JACKSON,
Hastings, Nebraska,
DOUGLAS GLEASON,*
THOMAS E. GLEASON,
JULES V. DOTY,
Ottawa, Kansas,
HOLLIS B. LOGAN,
Topeka, Kansas.

*Attorney upon whom service should be made.

INDEX

Judgment Appealed from Does Not Rest on Nonfederal Grounds 2

Effect of Commission Orders Not Confined to "Production and Gathering" 7

Conclusion 9

Cases Cited

Davis v. *Wechsler*, 263 U.S. 22, 68 L. Ed. 143 5-6

Iowa-Des Moines Nat. Bank v. *Bennett*, 284 U.S. 239, 76 L. Ed. 265 6

Kansas-Nebraska Natural Gas Co. v. *State Corporation Commission*, 169 Kan. 722, 222 P.2d 704 3

N.A.A.C.P. v. *Alabama*, 357 U.S. 449, 2 L. Ed. 2d 1488 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 140.

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., a Corporation,
Appellant,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

REPLY OF APPELLANT KANSAS-NEBRASKA NATURAL GAS COMPANY, INC.,[1] IN OPPOSITION TO MOTIONS TO DISMISS

This will reply to and oppose the motion to dismiss this appeal filed jointly by the State Corporation Commission of the State of Kansas[2] and the Southwest Kansas Royalty Owners Association[3] and the motion to dismis

1. Hereafter called Kansas-Nebraska or appellant.
2. Hereafter called Commission.
3. Hereafter called Royalty Owners.

this appeal filed by Panhandle Eastern Pipe Line Company.[4] Both motions were filed purportedly pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States. Both motions raise substantially the same primary question and present substantially the same arguments in support of the requested relief. The motions urge generally that this Court should not indicate probable jurisdiction because the judgment of the Kansas Supreme Court from which this appeal is taken rests on adequate nonfederal grounds, because the federal questions sought to be reviewed in this appeal were not timely or properly raised, and because no substantial federal question is presented by this appeal. Panhandle's motion states a subsidiary question to be whether the Commission or the private pipe line companies shall fix the amount of gas to be produced from the Kansas Hugoton gas field.

Judgment Appealed from Does Not Rest on Nonfederal Grounds

Appellant Kansas-Nebraska during the course of the hearings before the Commission, in its Applications for Rehearing presented to the Commission after entry of the orders complained of, in its Petitions for Judicial Review filed in the District Court of Finney County, Kansas, and in its Appeal to the Kansas Supreme Court, raised, presented and argued the federal questions presented in this appeal to the Supreme Court of the United States. At no stage of the above proceedings did appellant abandon or fail to urge its positive position on the federal questions which it now asks this Court to consider and decide. (Jurisdictional Statement pp. 4-5 and references there noted.) The Kansas Supreme Court in the judgment appealed from did not rest its decision

4. Hereafter called Panhandle.

on adequate nonfederal grounds. It expressly determined substantial federal questions which were properly and timely presented.

Both motions to dismiss, insofar as they argue that the judgment of the Supreme Court of the State of Kansas from which this appeal is taken rests on adequate nonfederal grounds, are clever attempts to make form appear to be substance and substance appear to be form.

The argument is that Kansas-Nebraska's appeal to the Kansas Supreme Court from the judgment of the District Court of Finney County, Kansas, was decided adversely to appellant on the jurisdictional/procedural ground that the Court in Finney County was without jurisdiction to entertain the proceedings appellant instituted there to have the Commission orders reviewed. The question was presented and argued as to whether two different state district courts—courts of concurrent jurisdiction—could both take jurisdiction of proceedings to review the same Commission order under provisions of the statute authorizing judicial review of Commission orders entered in administering the Gas Conservation Act.

The Kansas Supreme Court in an earlier opinion had dealt with consolidated appeals from judgments of two different district courts rendered in two separate proceedings in which the same Commission order had been subjected to judicial review. Propriety of this procedure was not directly questioned. There was no indication in that opinion that the seeking of separate reviews of that Commission order—in the same manner in which separate reviews were sought in two different district courts of the same Commission orders in this case—was subject to any jurisdictional/procedural objection. (*Kansas-Nebraska Natural Gas Co. v. State Corporation Commission*, 169 Kan. 722, 222 P.2d 704.)

In the consolidated appeals which resulted in the judgment from which this appeal is taken the Kansas Supreme Court did directly consider the propriety of such procedure. It did decide that only a single review of such a Commission order was contemplated and the district court in which a petition for review is first filed acquires jurisdiction to review the order to the exclusion of any or all other district courts. (See Jurisdictional Statement, Appendix "A", pages A1-A2 and A8-A9).

Review proceedings had been instituted by the Royalty Owners in the Stevens County District Court a few days before appellant initiated similar proceedings in the Finney County District Court. Under the rule announced by the Kansas Supreme Court in the opinion filed with the judgment appealed from, the Stevens County Court acquired exclusive jurisdiction to review the Commission orders and appellant could have and should have participated in the proceedings begun there. But this rule was announced in a single opinion dealing with all the appeals taken from the Stevens County District Court's judgment and the appeals taken from the Finney County District Court's judgment, all of which had been consolidated for hearing. That opinion was handed down on the same day and immediately after the Kansas Supreme Court had handed down its opinion in another group of consolidated appeals involving similar Commission gas allowable orders applicable to earlier proration periods. (192 Kan. 1, 386 P.2d 266. See Jurisdictional Statement, Appendix "B", pages A15-A56.) This first opinion was incorporated by reference in the opinion filed with the judgment here appealed from.

It is clear from a reading of both opinions that the Kansas Supreme Court had presented to it the same federal questions which are presented in this appeal. It is

clear that the Kansas Supreme Court squarely faced and directly decided these federal questions adversely to appellant's position and contentions. It is equally clear that the Kansas Supreme Court regarded appellant's appeal there as having been decided on its merits before considering, primarily for the guidance of future litigants, the jurisdictional/procedural question and before announcing the rule noted above and relied on in the motions to dismiss. This is revealed in part in the following two paragraphs quoted from the opinion filed with the judgment appealed from.

> "The questions presented by these appeals were determined in *Colorado Interstate Gas Co.* v. *State Corporation Comm.*, (41,515), 192 Kan. ....., ... P.2d ..... insofar as they challenge the Commission's orders for the reason that they are not supported by a substantial competent evidence; they violate the provisions of the Gas Conservation Act or the Commission's basic order; they constitute an interference with interstate commerce; they invade the province of the Federal Power Commission under the Natural Gas Act, or they violate the due process clause of the United States Constitution or impair the obligation of contracts. Undue repetition will be avoided if we incorporate that opinion here by reference as determinative of the issues mentioned. We do so.
>
> "There remains for determination the jurisdictional dispute between the two district courts, and the constitutionality and effect of G.S. 1961 Supp., 55-703, which amended G.S. 1949, 55-703." (Appendix "A", Jurisdictional Statement, pages A4-A5.)

Even if the Kansas Supreme Court had intended to rest its decision in appellant's appeal on state jurisdictional/procedural grounds there would be no jurisdictional bar to this Court's consideration of the Kansas Supreme Court's decision on the federal questions. (See *Davis* v.

Wechsler, 263 U.S. 22, 68 L. Ed. 143; *Iowa-Des Moines Nat. Bank* v. *Bennett*, 284 U.S. 239, 76 L. Ed. 265; *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 2 L. Ed. 2d 1488.)

Panhandle's motion to dismiss argues that appellant, in its appeal from the Stevens County District Court judgment, failed to save any federal questions. In the joint motion to dismiss of the Commission and the Royalty Owners it is argued that appellant, in its appeal from the Finney County District Court, did save the federal questions but then abandoned them by not arguing them in its brief.

Appellant did not participate in the proceedings in Stevens County. It appeared only specially to challenge the jurisdiction of the Stevens County District Court. Nevertheless it did appeal from the judgment of that Court and it specified as error the failure of that Court to consider and rule upon the constitutionality of the pertinent statute as implemented by the Commission's orders. Appellant initiated and participated in the proceedings in the Finney County District Court and its pleadings there detailed all the federal questions which are presented in this appeal. (Jurisdictional Statement, Appendix "G", pages A80-A81.) All those questions were saved on appeal to the Kansas Supreme Court by detailing them in the Specifications of Error in the abstract which appellant filed jointly with appellants Northern Natural Gas Company and Cities Service Gas Company. In cooperation with counsel for those companies appellant in its brief filed in the Kansas Supreme Court emphasized in and nearly confined its argument to issues of the reasonableness and lawfulness of the Commission's orders when measured against established rules of law applicable to orders of administrative bodies. However, appellant referred in its brief to the importance of the federal questions raised by its appeal and adopted the arguments made on those questions by its co-appellants Northern Natural Gas Com-

pany, Cities Service Gas Company and Colorado Interstate Gas Company. The Kansas Supreme Court and all parties to the appeals before it clearly understood that in light of recognized practices appellant was in fact arguing the federal questions involved with the very vigorous emphasis accorded those questions in the briefs of its co-appellants. It did so in a manner designed to relieve the Court of the necessity of reading and considering again the same arguments on the same questions framed in different words and phrases.

Effect of Commission Orders Not Confined to "Production and Gathering"

In both motions there is studied effort to clothe the Commission orders with some legitimate state purpose and to negate appellant's assertions that the orders are in conflict with federal authority. In this vein both motions make a point of appellant's candor in acknowledging in its Jurisdictional Statement that the state's power to limit production of natural gas from a common source of supply to prevent waste and protect correlative rights is no longer questioned. Our "candor" is nothing more than recognition of established law but it is seized upon triumphantly by appellees as though it were a damaging admission artfully wor from an obdurate but unwary adversary. They torture this statement of the law to make it yield authority for the Commission's orders but even under torture it cannot give up what it does not have. They conveniently ignore the word "limit" in the statement.

The Commission's orders do not limit production though terms of limitation are used as a polite bow to the Commission's statutory authority. The orders were not intended to limit production. They were intended to increase production. The Commission and the Royalty Owners unwittingly add another admission of this inten-

tion on page 9 of their joint motion when they say "If waste is caused by unwarranted limitation of production the *correction* of such a limitation is certainly a waste prevention measure.". (Emphasis supplied). The "unwarranted limitation," if such there ever was, was that lawfully ordered by the Commission itself in prior production allowable decisions. The "correction" referred to was in fact a reflection of the abandonment of all intention to limit production.

In the joint motion of the Commission and the Royalty Owners it is argued on page 8 that the orders were a valid exercise of state authority because they were "necessary and designed to prevent physical waste of natural gas and to protect the correlative rights of the landowners and lessees." There is no suggestion as to how the orders protected correlative rights as indeed there could not be. There is reference to the waste of gas which can result from corrosion of well casings. Such corrosion can permit the introduction of water into the producing formation causing damage to the reservoir. Also it can cause premature abandonment of production when the casing failure occurs before all recoverable gas is produced but when not enough gas remains to make it economically feasible to install new casing. Recommendations were made to the Commission by a witness for the Royalty Owners as to the level of allowable production required to prevent such waste. (He specifically insisted that his recommendations had nothing to do with and did not measure "market demand" for gas from the Kansas Hugoton Field.)

In paragraph H of the Report and Order of the Commission (Jurisdictional Statement, Appendix "E", pages A67-A68) the Commission states that it "cannot effectuate the recommendations" of the Royalty Owners' witness. It makes no reference to any purpose in its order

to prevent waste which might result from corrosion of well casings.

Panhandle argues in its motion beginning on page 7 that the Commission and not the private pipe line companies should determine the amount of gas which may be produced from the Kansas-Hugoton Gas Field. This argument is pointless—a blunt instrument with which Panhandle heroically destroys an ominous straw man of private pipe line company control which it built expressly for that purpose.

The Commission has always determined how much gas may be produced from the field. The pipe line companies have determined only how much gas they can and intend to purchase from the field.

The errors the Commission has made in its determinations and the conflicts of state with federal authority which have resulted from those errors, are already detailed in our Jurisdictional Statement.

Conclusion

The motions to dismiss should be denied. Probable jurisdiction of this appeal should be noted and it should be docketed for hearing and consideration on its merits.

Respectfully submitted,

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Nos. 75, 83, 140

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

COLORADO INTERSTATE GAS COMPANY, *Appellant*,
vs.
THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION AND PANHANDLE EASTERN PIPE LINE COMPANY, *Appellees*.

NORTHERN NATURAL GAS COMPANY AND CITIES SERVICE GAS COMPANY, *Appellants*,
vs.
THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION AND PANHANDLE EASTERN PIPE LINE COMPANY, *Appellees*.

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., *Appellant*,
vs.
THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION AND PANHANDLE EASTERN PIPE LINE COMPANY, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

RESPONSE OF APPELLEES STATE CORPORATION COMMISSION OF THE STATE OF KANSAS AND SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION TO MEMORANDUM FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 75

COLORADO INTERSTATE GAS COMPANY, *Appellant*,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION AND PANHANDLE EASTERN PIPE LINE COMPANY, *Appellees*.

No. 83

NORTHERN NATURAL GAS COMPANY AND CITIES SERVICE GAS COMPANY, *Appellants*,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION AND PANHANDLE EASTERN PIPE LINE COMPANY, *Appellees*.

No. 140

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., *Appellant*,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION AND PANHANDLE EASTERN PIPE LINE COMPANY, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

RESPONSE OF APPELLEES STATE CORPORATION COMMISSION OF THE STATE OF KANSAS AND SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION TO MEMORANDUM FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE

The Solicitor General of the United States in his Memorandum on behalf of the Federal Power Commission as *amicus curiae* states the cases should be dismissed.

This response is for the purpose of stating that the responding appellees are not only necessarily in accord with this ultimate conclusion, but also agree with the expressed rationale leading to this position.

The Solicitor General's careful analysis of the facts is a refreshing contrast to appellants' many statements which are both inaccurate and unsupported in the record.

The Memorandum completely destroys appellants' suggestions that the Kansas judicial and regulatory authorities are joined together in a conscious conspiracy designed to transgress federal jurisdiction.

Appellants' prolonged efforts to carve out a new regulatory no-man's-land under the pious guise of defending federal regulation, typified by such *ad hominem* arguments, are now fully exposed.

We respectfully submit that these appeals should be dismissed so that state and federal regulation can cooperatively proceed after eight years of hearings and litigation.

Respectfully submitted,

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